RECORD, CASE No. 14,119.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 159.

THE NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY AND THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

MARTIN R. HENDRICKS, ADMINISTRATOR OF J. C. HENDRICKS, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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1 M. R. HENDRICKS, Adm'r,
vs.
C., O. & S. W. R. R. *et al.*
} Damages. Power of Attorney.

DYERSBURG, TENN., *July* 21, '88.

To H. Parker, Jr., & J. N. Parker:

I hereby authorize and empow- you or either of you to sign my name — security of M. R. Hendricks, adm'r of J. C. Hendricks, deceased, on a bond for cost in a suit he is about to commence against the Chesapeake, Ohio & Southwestern Railroad Company & the Newport News — Mississippi Valley Company, in the circuit court of Dyer county, Tennessee, for damages for killing said J. C. Hendricks; and my name so signed by you shall be as valid and binding as if signed by me in person.

W. F. PIERCE.
D. R. FIELDS.

2 *Prosecution Bond.*

We acknowledge *our* ourselves indebted to The C., O. & S. W. R. R. Co. and The N. N. and M. V. Co., the defendants in the above suit, in the sum of two hundred and fifty dollars, to be void on condition M. R. Hendricks, adm'r of J. C. Hendricks, deceased, prosecutes his action of damages this day commenced against said C., O. & S. W. R. R. Co. and N. N. & M. V. Co., in the circuit court of Dyer county, with effect, or if payment of all costs and damages incident on failure thereof, and pay all costs which may at any time be adjudged against him.

Witness my hand and seal this 31 day of October, 1888.

W. F. PIERCE,
By H. PARKS, JR.,
Att'y-in-fact.

3 D. R. FIELDS,
By H. PARKS, JR.,
Att'y-in-fact.

"*The Summons.*"

State of Tennessee to the sheriff of Dyer county, Greeting:

You are hereby commanded to summon the Chesapeake, Ohio & Southwestern Railroad Company and the Newport News and Mississippi Valley Company, if to be found in your county, to appear before the judge of our circuit court to be held for the county of Dyer, at the court-house, in the town of Dyersburg, on the third Tuesday in November next, then and there to answer M. R. Hendricks, administrator of J. C. Hendricks, deceased, in an action to his damage, fifty thousand dollars. Herein fail not, and
4 have you then and there *there* this writ.

Witness M. F. Brackin, cleark of our said court, at office, the third Tuesday in July, 1888.

M. F. BRACKIN, *Clerk.*

Endorsed: Summons. M. R. Hendricks, adm'r, *vs.* C., O. & S. W. R. R. Co. & N. N. & M. V. Co. Issued 31st day of Oct., 1888. M. F. Brackin, clerk.

Come to hand Oct. 31, 1888, and executed by serving on and summoning J. F. Prickett, agent, as commanded, Nov. 1st, 1888.

W. G. DYER, *Sh'ff.*

Counterpart of this summons issued this day after the execution of this summons to the sheriff of Shelby county, Tennessee, Nov. 1st, 1888.

M. F. BRACKIN, *Clerk.*

Counterpart Summons.

5 STATE OF TENNESSEE:

To the sheriff of Shelby county, Greeting:

You are hereby commanded to summon the Chesapeake, Ohio & Southwestern Railroad Company & the Newport News & Mississippi Valley Co., if to be found in your county, to appear before the judge of our circuit court, to be held for the county of Dyer, at the court-house, in the town of Dyersburg, on the third Tuesday in November next, then and there to answer M. R. Hendricks, administrator of J. C. Hendricks, deceased, in an action to his damage fifty thousand dollars; therein fail not, and have you then & there this writ.

Witness M. F. Brackin, clerk of our said court, at office, the — Tuesday in July, 1888.

M. F. BRACKIN, *Clerk.*

6 Endorsed: Summons. M. R. Hendricks, adm'r, *vs.* C., O. & S. W. R. R. Co. & N. N. & M. V. Co. Issued first day of November, 1888. M. F. Brackin, cl'k.

Come to hand 2nd day of November, and executed same day by reading contents of this writ to Holmes Cummins, director & attorney for C., O. & S. W. R. R. Co. & N. N. & M. V. Co.

A. J. McLENDON, *Sheriff,*
By J. A. PERKINS, *D. S.*

This summons is a counterpart of summons issued to sheriff of Dyer county Oct. 31, '88, and executed on this day by service on J. F. Prickett, agent at Dyersburg, Tenn., this Nov. 1, '88.

M. F. BRACKIN, *Clerk.*

The Declaration.

The plaintiff, M. R. Hendricks, as administrator of J. C. Hendricks, deceased, sues the defendants, The Chesapeake, Ohio
7 & Southwestern Railroad Company and The Newport News & Mississippi Valley Company, corporations doing business

in Tennessee, for the sum of fifty thousand — damages, for this, that the said defendants, on the 12th day of December, 1887, at Trimble Station, Tennessee, on their railroad, extending from Louisville, Kentucky, to Memphis, Tenn., negligently, carelessly, wantonly, recklessly run an engine and cars, then and there being operated by their servant, against, on, and over the said J. C. Hendricks, the intestate of plaintiff, thereby mangling, bruising, and crippling him so that he died by reason thereof on the evening of that same day, after suffering great and excruciating pain and agony of body & mind, and causing great expense in providing proper
8 medical treatment & attention. Plaintiff avers that said injuries were inflicted and the death of his intestate was caused by reason of the gross, wanton, and criminal negligence of the servants of defendants then and there operating said engine and cars on said railroad.

Wherefore he sues to recover fifty thousand dollars damages aforesaid.

Plaintiff demands a jury.

STOK-S, PARKS & STOKES,
Att'ys for Plaintiff.

The plaintiff sues the defendant corporations for the further sum of fifty thousand dollars as damages for this, that said defendants control & operate a railroad extending from Louisville, Kentucky, to Memphis, Tennessee, and that the town of Trimble is one of the regular stations on said railroad in this State at which the trains of defendant delivered and received the daily mails and express matter and
9 received and put off passengers' freight; that plaintiff's intestate, J. C. Hendricks, was postmaster & express agent at Trimble Station and it was his duty & custom to meet the passenger, mail, & express trains passing said stations in the daytime in order to put on & receive from said trains the mail & express matter;) (that said defendants have been guilty of great negligence in the location & use of their depot, platform, and track with reference to each other at said station; that the depot, ticket office, post office, & express office at said station are situated on the east side of said track & on west side of the depot and next to it is side track, and west of the side track is the main track, upon which all pas-
10 senger, mail, & express trains stop, & west of this track defendants had erected & used an open and uncovered platform, to which and from which all mail & express matter and passengers are delivered to and received from said defendants' trains, and the said defendants made a crossing to this platform and required the postmaster and express agent to deliver and receive the mail and express matter from said platform and opened their mail and express cars only on the west side at said station: that no sitting-room and no accommodation whatever was provided on the west side of the track to shelter parties waiting for an approaching train, and it was the custom for passengers and persons whose business required them to meet the train to wait on the east side of the track,
11 where the defendants had provided suitable accommodations,

until the train signalled for the station and then to cross over the track in front of the approaching train to the aforesaid platform. This custom was well known to the defendants, and on their part the defendants had made it a custom after signalling for the station to check up the speed of the train so — to enable parties to reach the aforesaid platform in safety, and this custom was well known to defendants and their servants and to plaintiff's intestate and to the public a- Trimble, and crowds were accustomed to so cross defendants' track to meet said train daily, as defendants well knew; that according to the s-hedule of defendants their regular passen-
12 ger, mail, and express train going north was due at said station at 53 minutes after 12 o'clock noon on the 12 day of December, 1887, and a large crowd was there to meet said train and some to take passage on the same, and that plaintiff's intestate, in the discharge of his duty, was there with the mail and express matter; that, as was customary, plaintiff's intestate, together with other parties waiting for said train, remained on the east side of the track until the signal should be given of the approaching train; that at or a few minutes after the time the passenger train was due according to the schedule a signal of an approaching train was heard coming from the south, and, supposing the same to be the passenger, mail, and
13 express train, and also being informed by an agent of the defendant that it was that train, the crowd, plaintiff's intestate among the number, commenced, as customary, to cross over the track to the aforesaid platform in front of the approaching train and in ample time to have reached the platform in safety if said train had been run with care and prudence and at a reasonable rate of speed, as customary at that place; that some of the crowd and passengers reached the platform in safety, but plaintiff's intestate, while crossing the track immediately behind some of the passengers and in front of some parties that were following (the agent of defendant being one of the parties), was caught and
14 struck by the engine of defendant, which was then and there going through said town and by said station at a great, unusual, and reckless rate of speed, at the rate of forty or forty-five miles per hour, throwing him violently against the embankment on the side of the track and thence on the cross-ties of the side track, and crushing his skull and body and so mangling, bruising, and crippling him that he died of the wounds which were then and there received on the evening of that same day, after suffering great excruciating pain and agony both of mind and body. (Plaintiff avers that said train was not the mail and express train, but an irregular train composed of an engine, tender, and
15 caboose, then and there ran at a great, unusual, and reckless rate of speed by defendants' servants, and he avers that it was so run in advance of and on the schedule time of the regular passenger, mail, and express train without notice to any one that such a train would pass there in advance of the regular train then due, and he further avers that the said irregular train blew its whistle not far from the town of Trimble, but that the whistle was

not blown for the town of Trimble at the distance from said town required by law, nor were any other signals given, as required by law, before reaching said station, nor was its speed reduced,
16 but that said irregular train was run at its utmost speed through said town and to and by said station without ringing its bell or blowing, or checking its speed, as required by law (and no danger signal was given, notwithstanding the fact that a large number of people were on the platform and on the track in front of said train, passing over the platform in full view of defendants in charg- of said train; and he further avers that so running and operating said train was gross, wanton, and criminal negligence and recklessness on the part of defendants and their servants, and that by reason of said negligence and recklessness his said intestate was bruised, mangled, and crushed a- aforesaid, and
17 suffered great and excruciating agony of body and mind as aforesaid, and lost his life as aforesaid.)

Plaintiff further avers that his intestate was in the discharge of his duty and using due care and caution in going upon defendants' track; (that his view of the approaching — was cut off by buildings, cars, and lumber, which the defendants had placed and allowed to be placed and to remain upon their yard, and that it was impossible for him to see said train until he had reached the main track; that said train makes far less noise than the passenger, mail, and express train made, and plaintiff's intestate could not tell how near it was by the noise it made, and if said wild train had been the passenger, mail, and express train, or if it had
18 been run with the requisite care and caution and according to the known care and custom of defendants upon approaching said station, plaintiff's intestate would have crossed the track in safety.

Plaintiff further avers that defendants were guilty of great and reckless negligence in so running said irregular train through said town and station, especially when it was being run on the schedule time of the passenger, mail, and express train, which always stopped at said station and uniformly checked up its speed on approaching said crossing, thereby enabling parties to cross the track in safety before it pulled up to the platform.

Plaintiff further avers that defendants gave no notice in
19 advance, as was their duty to do, that said irregular train was run on the schedule time and just in advance of the regular passenger, mail, and express train and make no stop at Trimble Station, and, looking to the custom as aforesaid in regard to passenger, mail, and express trains, plaintiff avers that the defendants were guilty of the grossest negligence and showed an utter and wanton disregard for human life in running said irregular and wild train at its utmost speed through said town and by said station and through a crowd of people assembled there, giving to them no warning of their imminent danger and peril, and plaintiff avers that defendants' negligence before and at the time
20 of and conduct after said accident show wilful, wanton, and malicious negligence, and that after plaintiff's intestate was

struck and mortally wounded and rendered utterly helpless as aforesaid that said train continued in its onward rush for about one mile beyond said station before the parties in charge of said train started back to see what damage had been done.)

Plaintiff avers that defendants, in failing to observe and to give the signs and signals required by law to be observed and given by trains approaching towns and stations like Trimble Station (and their failure to slack the speed of their train and in running said train through said town and crowd and by said station at
21 its utmost speed were grossly, recklessly, wantonly, and wilfully negligent, and that their negligence was the direct and proximate cause of his intestate's injury and death.)

Plaintiff further avers that his intestate not only suffered great and excruciating agony of body and mind before his death, but was put to great expense to procure medical treatment and attention. Plaintiff therefore sues for fifty thousand dollars.

STOKES, PARKS & STOKES,
Att'ys for Pl'ff.

Endorsed: Declaration. M. R. Hendricks, adm., *vs.* C., O. & S.W. R. R. Co. and N. N. & M. V. Co. Filed Nov. 22, '88. M. F. Brackin, cleark.

Pleas.

In this cause said defendant, C., O. & S.W. R. R. Co., comes
22 and for pleas to the first count of the plaintiff's declaration in this cause says:

1. That it is not guilty of said alleged wrongs and injuries set forth and complained of therein against it. Wherefore, —.

2. That said alleged injuries to plaintiff's intestate and his death therefrom were the result of his own want of proper care and attention for his own safety, which contributed to and caused his injuries and death; and this contributory neglect defendant sets — and pleads —. Wherefore, &c.

And said defendant moves the court to strike out the following clauses of second count of said declaration, viz: On page 2 of said declaration, beginning with the words "that said defendants
23 control and operate a railroad," &c., thence to and including 13th line of same page, ending with the words "and express matter;" and, beginning on line 13 of said page 2 with the words "that said defendants had been guilty of great negligence in the location," &c., down to and inclusive of part of line 24, page 3, and ending with the words "and supposing the same to be the passenger, mail, and express train;" and, beginning on line 16, page 4, with the words "plaintiff avers that said train was not the mail and express train," &c., down to and inclusive of part of line 22 and ending with the words "regular train then due;" and, beginning on line 2 of page 5 with the words "and no danger signal
24 was given," &c., down to and inclusive of line 2, page 5, and ending with the words "his life as aforesaid;" and, beginning line 14 of page 5 with the words "that his view of the ap-

proaching train," thence down to and inclusive of line 21 on page 6, with the words "and in its failure to slack up the speed," &c., down to and inclusive of line 28 on same page and ending with the words "injury and death;" and rests this motion to strike out said clauses on the ground that the matters therein severally stated are irrelevant and immaterial and constitutes no cause of action against defendant.

And said defendant demurs to said several clauses of said second count referred to and mentioned in its motion to strike out
25 above, and for cause of demurrer shows that the several matters therein set forth and stated constitute no cause of action against defendant and are irrelevant and immaterial. Wherefore, &c.

LATTA, PARKS & DRAPER AND
HOLMES CUMMINGS, *Att'ys.*

Endorsed: C., O. & S. W. R. R. Co.'s pleas to first and demurrer to second count. M. R. Hendricks, adm'r, *vs.* N. N. & M. V. Co. & C., O. & S. W. R. R. Co. Filed by def't before roll-call on this Monday, Nov. 26, '88. M. F. Brackin, cleark.

Petition to Remove to U. S. Circuit Court.

In this cause the defendant Newport News & Mississippi Valley Company, respectfully petitioning the court, shows:

1. That the matter and amou-t in dispute in this cause,
26 exclusive of costs, exceeds the sum or value of $2,000.00 and is, to wit, the sum of $50,000.00.

2. That this is a suit of a civil nature, of which the circuit courts of the United States have jurisdiction in a controversy between citizens of different States, and that your petition-*s* at and before the commencement of this suit — and now still is a citizen of the State of Connecticut, U. S. A., and that the said plaintiff, M. R. Hendricks, adm'r as aforesaid, at and before the commencement of this suit was and still is a citizen of the State of Tennessee; that this controversy is wholly between your petitioner and said plaintiff, citizens of different States, and can be fully determined as between them without the presence of the other defendant.

27 3. Your petitioner further shows that indeed the said Chesapeake, Ohio & Southwestern R. R. Co. is neither a necessary nor a proper party to this suit, and that the plaintiff has joined said railroad Co. as a defendant simply for the purpose of endeavoring to defeat your petition-'s right of removal of this cause to the circuit court of the United States for this district, and that said *cause* (course) of the plaintiff is fraudulent and an unjust and illegal attempt to deprive said United States court of its lawful jurisdiction, as well as a fraud upon said petitioner's right to have this case removed to & tried in said United States circuit court.

4. Your petitioner says that heretofore, to wit, on the —
28 day of ——, 1888, the said plaintiff began in this court his action against said defendants for the same matters and

things set forth and complained of by him in his declaration above in this cause, and that after beginning his said suit the plaintiff dismissed his said action against said C., O. & S. W. R. R. Co. and proceeded therein alone against your petitioner. Thereafter, on the — day of ——, 1888, being one of the days of the March term, 1888, of this court, your petitioner filed in said former proceedings of plaintiff against it a petition for the removal of said cause from this court to the circuit court of the United States for this district, and your honor, at the July term, 1888, of this court, granted the
29 prayer of said petitioner and directed the removal or transfer of said former cause to said United States circuit court.

That said former cause was proceeded with in said United States circuit court and issue joined between the plaintiff and your petitioner, and that cause was about to be tried in said United States circuit court at Jackson, Tenn., when plaintiff dismissed his said suit in that court of his own volition, having there-fore begun this present cause in this court against your petitioner and said Chesapeak-, Ohio and Southwestern R. R. Co., joining the latter herein as aforesaid fraudulently and for the simple purpose of divesting the Federal court of its jurisdiction and depriving your petitioner
30 of his right to have this cause tried and determined by said United States court, he having no claim whatever against said C., O. & S. W. R. R. Co.; that, as was and is well known to the plaintiff, said Chesapeak-, Ohio & Southwestern Railroad Company, defendant, was not on said 12th day of December, 1887, and had not been since the 31st day of January, 1886, and is not in the possession, control, or operation of said railroad extending from Louisville, Kentucky, to Memphis, Tenn., mentioned in the declaration, said railroad company, defendant, having on and prior to said 31st day of January, 1886, assigned, transferred, leased, and delivered possession of said railroad to your petitioner, who, on the 1st
31 day of February, 1886, entered into sole and exclusive possession and control thereof, and who, on and since said 1st day of February, 1886, continually to this day (including said 12th day of December, 1887) and now is in the sole and exclusive control, use, and possession and operation of said railroad, control-ing and operating same, through its own agents and employés, to the entire and total exclusion of said railroad company, defendant, who, on said 31 day of January, 1886, entirely denuded itself of all possession and control as well as of the operation and use of said railroad. These matters were well known to the plaintiff at and before the commencement of this action, and by his dismissal of said former suit as against said railroad company, defendant, in
32 this court, at its March term, 1888, the plaintiff admit-ed and confessed that he had no cause of action against that party, as well as that his sole right or cause of action was against your petitioner alone. The matters sued for and involved in said former suit of the plaintiff were and are identical with and the same as those sued for in the present action. As above stated, this controversy is alone between the plaintiff, a citizen of Tennessee, and your petitioner, a citizen of Connecticut, and said C., O. & S. W. R. R. Co.

is neither a proper nor necessary party to his suit, and the issue herein can be fully determined between your petitioner and the plaintiff without the presence of said other party.

33 6. Your petitioner offers herewith a bond, with good and sufficent surety, in the penalty required by law, for entering in the said circuit court of the U. S. for the eastern division of the western district of Tennessee, at Jackson, on the first day of its next session, a copy of the record in this suit and for paying all the costs that may be awarded by said circuit court if this court shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law and to accept of said bond and surety and cause the

34 record herein to be removed in the said circuit court of the U. S. in and for the eastern division of the western district of Tennessee, at Jackson; and as *ever* bound, &c.

LATTER, PARKER & DRAPER, &
HOLM-S CUMMINGS,
Att'ys for Petitioner.

Endorsed: Hendri-ks, adm'r, *vs.* N. N. & M. V. Co. Petition for removal. Filed 23 Nov., 1888. M. F. Brackin, cleark.

Bond.

Know all men by these presents that we, the Newport News and Mississippi Valley Co., as principal, and Holmes Cummings, as surety, are hereby held and firmly bound unto M. R. Hendricks, administrator of J. C. Hendricks, in the penal sum of five hundred

35 dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such that if said N. N. and M. V. Co. shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the eastern division of the western district of Tennessee on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of the county of Dyer and the State of Tennessee, in

36 which said M. R. Hendricks, adm'r as aforesaid, is plaintiff and said Newport News & Mississippi Valley Co. *et al.* are defendants, and shall do such other acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court unto the United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 23rd day of November, 1888.

NEWPORT NEWS & MISSISSIPPI
V. CO., [L. S.]
By HOLMES CUMMINS, *Surety.* [L. S.]
HOLMES CUMMINS, *Surety.*

STATE OF TENNESSEE, }
County of Dyer. }

I, —— ——, of said county, the surety named in the foregoing bond, being duly sworn, do say & depose that I am a resident
37 of the State of Tennessee and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property exempt by law from execution; that I have property in the State of Tennessee liable to execution of the value of more than five hundred dollars.

HOLMES CUMMINS.

Subscribed in my presence and sworn before me this 23 day — Nov., 1888.

M. F. BRACKIN, *Cleark.*

Endorsed: Bond for removal of cause. In the circuit court of Dyer county, Tennessee, November term, 1888. M. R. Hendricks, adm'r, plaintiff, against N. N. and M. V. Co., defendants.
38 Bond to accompany petition to remove said cause to the circuit court of the United States for the district of — under act of March, 1867, as embodied in the United States Revised Statutes. Filed the 23 November, 1888. M. F. Brackin, cleark.

Answer to Petition.

Comes the plaintiff and takes issue upon the petition of the Newport News and Mississippi Valley Company filed herein November 23, 1888, asking that this cause be removed from this court to the United States circuit court at Jackson, Tennessee, and plaintiff avers that the statements and charges in said petition, viz., that this controversy is wholly between said N. N. and M. V. Company and this plaintiff, and that the defendant The Chesapeak-, Ohio
39 and Southwestern Railroad Company *and that the defendant Chesapeak-, Ohio and Southwestern Railroad Company* is neither a necessary nor a proper party to this suit, and that the plaintiff has joined said railroad company simply for the purpose to defeat petitioner's right to remove this case to the circuit court of the United States, and that the plaintiff did *not* fraudulently and for the simple purpose of divesting said Federal court of its jurisdiction, and charging that plaintiff knew that defendant The C., O. & S. W. R. R. Co. was not liable to him in this cause, are each and all and every one of them false and without any foundation in fact;
40 but plaintiff avers that he has a joint right of action against both defendants.

STOKES, PARKS & S-OKES,
Att'ys for Pl'ff.

Endorsed: M. R. Hendricks, adm'r, *vs.* C., O. & S. W. R. R. Co. and N. N. and M. V. Co. Answer to petition. Filed Nov. 24, 188–. M. F. Brackin, cleark.

Order Refusing Petition to Remove.

On this 24th day of November, 1888, the defendant The Newport News and Mississippi — Company presented to the court its petition to remove this cause from this court to the United States circuit court for the eastern division of the western district of Tennessee at Jackson, Tennessee, and tendered its bond for the removal of
41 said suit, and this cause came on to be heard and was heard before the Honl. Thos. J. Flippin, judge, upon the said petition and bond and upon plaintiff's declaration filed herein, and upon argument of counsel the court is of opinion that this suit is brought by the plaintiff against the defendants, The Chesapeak-, Ohio and Southwestern Railroad Company and The Newport News and Mississippi Valley Company, jointly, and the plaintiff in his declaration has filed a joint declaration against both said defendants, and it further appearing that the defendant The Chesapeak-, Ohio & Southwestern Railroad Company is a resident of this State, and that the defendant The Newport News and Mississippi Valley
42 Co. is a non-resident of Tennessee, and that both said defendants are necessary and indispensable parties to the full and final determ-ation of this controversy, and that the petitioner, The Newport News & Mississippi Valley Company, is not entitled to have this cause removed, it is therefore ordered and adjudged that this said petition and application to remove said suit be, and the same is hereby, refused and disallowed, and to said ruling and action of the court the defendant Newport News and Mississippi Valley Company excepts.

Endorsed: M. R. Hendricks, adm'r, *vs.* C., O. and S. W. R.
43 R. Co. *et al.* Order refusing petition to remove. November term. Entered Book G, page 30.

Motion to Strike Out.

On this day, Dec'r 4th, 1888, comes the defendants and moved the court to strike out certain specified clauses in the second count of plaintiff's declaration, and upon demurrer to said clauses — irrelevant, &c., and the court is of opinion that the clauses moved to be stricken out are irrelevant and immaterial. The defendants' motion is allowed, and, the court being of opinion that with said irrelevant and immaterial clauses stricken out the remaining portion of said second count states no new or other cause of action other
44 than is contained in the first count of plaintiff's declaration upon which issues are joined and have been taken by defendants, the court of its own motion strikes out the second count. To the action of the court in striking out the second count of his declaration plaintiff excepts.

Caption Minutes, March Term, 1889.

Be it remembered that a circuit court was begun and held this day for the county of Dyer, at the court-house, in this town of Dyersburg, Tenn., it being the 19th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, & the
45 113th year of American Independence, when the following proceedings were had, to wit:

THURSDAY, *March 1st*, 1889.

Court met this morning at 9 o'clock pursuant to adjournment—present and presiding, Hon. Thos. J. Flippin, judge of 13th judicial circuit of Tennessee—when the following proceedings were had, to wit:

M. R. HENDRICKS, Adm'r,
vs.
C., O. & S. W. R. R. Co. *et al.* } Damages.

Come the parties, by their attorneys, when, upon affidavit of defendant, this cause is continued to the next term of this court and set for trial on the first day of next (July) term of this court.

46 *Caption of Minutes, July Term*, 1889.

Be it remembered that a circuit court was begun and held this day for the county of Dyer, at the — house, in the town of Dyersburg, Tennessee, it being the 16th day of July, in the year of our Lord one thousand eight hundred & eighty-nine, and the 113th year of American Independence, when the following proceedings were had, to wit:

THURSDAY MORNING, *July 18th*, 1889.

Court met pursuant to adjournment—present & presiding, Hon. T. E. Richardson, special judge—when the following proceedings were had, to wit:

In Matter of Continuance of Civil Docket.

47 On petition of the bar the court was pleased to continue all cases coming on for trial on civil dockets (except such as both parties consent to try at present term) to the next (November) term of this court.

Final Caption, Nov'r Court, 1889.

STATE OF TENNESSEE, }
Dyer County. }

Be it remembered that a circuit court was begun and held this day for the county of Dyer, at the court-house, in the town of Dyersburg, Tenn., it being the 19th day of July, in the year of our Lord

one thousand eight hundred and eighty-nine, & the 113th year of American Independence, when the following proceedings were had, to wit:

48 WEDNESDAY, *Nov'r 20th*, 1889.

Court met pursuant to adjournment—present and presiding, Hon. T. J. Flippin, judge of the 13th judicial circuit of Tennessee—when the following proceedings were had, to wit:

M. R. HENDRICKS, Adm'r,
vs.
N. N. & M. V. Co. *et al.*

Come the parties, by attorneys, and also a jury of good and lawful men, to wit, J. J. Yates, R. J. Stallcup, J. Summit, Joseph Lucas, Ed. Chitwood, S. M. Drummond, W. M. Dean, D. R. Holland, F. R. Prichard, T. A. Fowlkes, James Cox, and W. L. Kelley, who, being elected, empaneled, and sworn well and truly to try the issues joined herein, were, for the want of time to hear and deter-
49 mine the matters herein by the court, respited until to-morrow morning at 8½ o'clock.

FRIDAY, *Nov. 22nd*, 1889.

Court met pursuant to adjournment—present and presiding Hon. Thos. J. Flippin, judge, &c., of the 13th judicial circuit—when the following proceedings were had, to wit:

M. R. HENDRI-KS, Adm'r,
vs.
N. N. & M. V. Co. *et al.*

Came the parties, by attorneys, and also the jury herein respited on yesterday, who, being unable for want of time to hear and determine the issue herein, were by the court again respited until to-morrow morning.

SATURDAY MORNING, *Nov.* 23, 1889.

50 Court met this morning pursuant to adjournment—present and presiding, Hon. T. J. Flippin, judge of 13th judicial circuit of Tennessee—when the following proceedings were had, to wit:

M. R. HENDRI-KS, Adm'r,
vs.
N. N. & M. V. Co. *et al.*
} Damages.

Came the parties, by attorneys, and also a jury of good and lawful men on yesterday respited herein, to wit, J. J. Yates, R. J. Stallcup, J. Summit, Joseph Lucas, Ed. Chitwood, S. M. Droummond, W. M. Dean, D. R. Holland, F. R. Prichard, T. A. Fowkes, James Cox, and W. L. Kelley, who, being empaneled, sworn, & charged well and truly to try the issues herein, upon their oath do
51 say that they find the issues for the plaintiff and assess his damages at fifteen thousand dollars.

It is therefore considered by the court that the plaintiff recover of the defendants the sum of fifteen thousand dollars, as well as the costs herein, for which let execution issues.

Motion for New Trial.

In this cause def't N. N. & M. V. Co. moves the court to set aside the verdict for $15,000.00 returned herein at this term and grant it a new trial—

Because of error in the court in refusing to transfer and
52 remove this cause to the circuit court of the United States as heretofore petitioned and moved by this defendant, and both defendants move the court to set aside said verdict & grant them a new trial because said verdict is excessive and not supported by the evidence; because the damages ascessed by the jury are excessive; because of error in the court in refusing to charge the jury as requested by defendants; because the verdict is not supported by the evidence.

And this cause coming on to be heard on defendants' motion for a new trial, after argument upon said motion by counsel the court overrules and disallows same; from which ruling
53 and action of the court defendant prays an appeal in the nature of a writ of error to the next term of the supreme court at Jackson, Tennessee, which is granted upon the execution of an appeal bond as the law requires, and the same is accordingly executed, with Holmes Cummins and W. S. Draper as sureties on said appeal bond; and in this cause defendants tendered their bill of exceptions to the judgment of the court overruling their motion for a new trial, which, being signed and sealed by the court, is ordered to be made part of the record.

Bill of Exceptions.

54 On the trial of this cause the plaintiff introduced evidence which showed that on 12th of Dec'r, 1887, said J. C. Hendricks, then United States postmaster and agent of the express company at Trimble, on the Chesapeake, Ohio and Southwestern railroad, a town of some three hundred or more people, in Dyer county, was struck by an engine and train on the railroad that runs through said town from Memphis to Louisville; that said engine and train, consisting of one car—a freight caboose—was being run on the schedule of the regular passenger train, which carried the mail and ex-
55 press and regularly stopped at Trimble, said engine and caboose running ahead of the passenger train, and said J. C. Hendricks was at the time going to the railroad station and platform to meet the passenger train, deliver and receive the mail and express therefrom.

That the railroad there was so constructed and arranged that the depot building, ticket office, waiting-room for passengers, telegraph offices, &c., were on the east side of the railroad track, the business part of the town, the post office, express office, &c., all being east of

the depot and some seventy yards therefrom; that next the depot and on the west side thereof was a side track of the railroad,
56 & next the side track and on the west thereof was the main line or track of the railroad, and on the west of this main-line track was an open platform some one hundred feet or more in length, to and from which passengers passed in getting off and on the cars and to or from which the mail and express matter was delivered or received to or from the cars; that the railroad owned the ground adjacent the tracks for some seventy yards on either side and some two thousand feet north and south, including the depot; that no arrangement had been made by the railroad for transacting the mail and express business
57 with the trains upon the east side of the tracks, & it was necessary for said J. C. Hendricks, as said postmaster and express agent, as well as all passengers and other persons doing business with the trains, to cross over both the side track and the main-line track to the west side of both, before the train, in order to receive and deliver the mail, express, &c.; that a passway or crossing had been arranged by the railroad from the depot at its north end for passengers and others having business with the trains to pass across the side track and main-line track to the west side of both to the
58 platform on the west side, and said J. C. Hendricks and the people generally were accustomed to cross over the tracks ahead of trains on this passway; that north-bound passenger trains approached and crossed said passway more slowly than those bound south and at not over four miles per hour, as most of the platform was south of the crossing; that at the time (Dec. 12th, 1887) there were several cars standing on the side track, some north of the depot and perhaps some twenty or thirty feet from said passway, others south of the passway, these latter coming up to the passway and extending a long distance south of it; that these cars had
59 been there all that morning, the space between the two tracks being so narrow that when cars were on both tracks only about three feet clear space was left; that south of the depot on the east of the railroad there were large stacks of lumber next to the side track, extending two hundred or more —; the railroad south of the platform there was a section tool-house; that these lumber piles, depot-house, and cars on the side track obstructed the view of a person coming from the post office to the platform of any train approaching from the south, so that it could not be seen
60 until after crossing the side track and within three feet of the main-line track or the sweep of cars thereon, and that then because of a curve to the southeast of the railroad the section tool-house again hid from view a train coming from that direction until it was within one hundred yards or less of the passway; that said engine and caboose that struck said J. C. Hendricks approached and ran past said depot and platform and over said passway — unusual and high rate of speed, to wit, 30 to 40 miles an hour, and struck said J. C. Hendricks just as he was crossing the main-line track with his mail bag and express package, he
61 having come quietly from the post office and across the side

track, knocking him some 46 ft. against a bank of earth, rebounding against the cross-ties, crushing his skull and bruising and mangling his body, so that he died about 45 minutes thereafter. Some witnesses stated that he was never conscious after being struck by the train and knew no one after the collision, but others that he groaned and seemed in pain till death, and one witness said that he tried to speak, but could not because of blood strangling him; that said engine and train sounded the station whistle at the usual place, about a half mile south of the depot, and again a road-
62 crossing whistle of three or four blasts about one-fourth mile south of the depot, but that no bell was ringing as it passed; that one other person crossing the tracks immediately in front of J. C. Hendricks escaped by only a few inches of being struck by said engine, and this only by a quick leap as he discovered the near and rapid approach of the engine, and another person (the depot agent), following behind said J. C. Hendricks a few feet, barely checked in time, after crossing the side track, to avoid being struck; that said J. C. Hendricks was then 33 years of age, had never married, was a good business man, and then receiving a good salary from
63 the post office and express office; his parents having died before him, his next of kin were three brothers (one of whom is the plaintiff) and two sisters, all of whom are married and none of whom were dependent on the decedent; that said J. C. Hendricks left no estate, no lands, moneys, notes, and plaintiff, as administrator, had received nothing of assets, beside $55.00, which came from his father's estate; that there was considerable mail and express business at Trimble, and that deceased was a fine business man and made a great deal of money and spent it freely; that, while said J. C. Hendricks occasionally took a dram, he was never drunk nor unable to attend to business, and was of good health and
64 sound body, except slightly crippled in one foot; that said engine and caboose approached and ran past said depot faster than trains usually run between stations, and the unusual speed of the train attracted the attention of witnesses to it before it struck Hendricks, and that no notice was given, by bulletin-board or otherwise, except the whistle signals, that it was approaching, and that said J. C. Hendricks supposed it was the regular passenger train due about that time, and that it would slow down before reaching said passway and stop across same; that the engine and caboose belonged to defendant Newport News and Mississippi Valley Company, and the engineer and other crew thereon were em-
65 ployés of that company, and by its rules they should have slowed in passing said Trimble Station or have stopped at the telegraph office there for orders; that said town of Trimble was not an incorporated town, and that the engineer running said engine was known on the road as a fast runner, one who made time with his train if it were possible, and that he ran past Dyersburg that same day at the rate of sixty miles per hour; that the Chesapeak-, Ohio and Southwestern Railroad Co. owned the road.

66 The defendant introduced proof tending to show that said engine & caboose ran through said station and past said de-

pot and platform at not exceeding fifteen miles an hour, having sounded the whistle a half mile south thereof for the station and again four blasts when one-fourth mile from the depot, and that the bell was ringing as it went through the town; that steam had been shut off and the engine was not puffing, but was rolling along; that said J. C. Hendricks only came into the view of the engineer, who was on the lookout ahead, as he passed from behind the cars on the side track and came on the main-line track
67 in front of the engine too close for the engineer to sound the alarm whistle, put on the brakes, or do anything toward avoiding the accident; that the train was stopped directly thereafter and the engineer returned to the station; that the schedule of the regular passenger train ahead of which he was running was less than 30 miles per hour, and that they did not run so fast through stations as between them; that his train did not run over 12 to 15 miles per hour through the stations from Memphis to Trimble, and did not run over that speed through Dyersburg
68 coming to Trimble; that said J. C. Hendricks after passing the cars on the siding did not stop nor look toward the approaching train, but continued going on the passway to cross the main-line track and was struck when one step more would have put him out of danger; that he could have stopped between the tracks and have seen the approaching train then about one hundred feet from him and have escaped hurt; that an hour or so before this, as the south-bound passenger train came into said Trimble and was rolling slowly across said passway, said J. C. Hendricks was crossing
69 over the tracks to the platform on the west side and only escaped being struck by that engine a few inches, he himself saying that it brushed his foot; that he was negligent and careless as to crossing the track in front of trains, and had been cautioned as to the danger he was running; that he sometimes indulged in drink, but never was drunk, and had taken two drinks of liquor that morning about 5 o'clock and was killed about dinner time; that the blow he received when struck by the engine rendered him unconscious, crushing his skull and bursting it open, man-
70 gling his face and generally concussing his brain, lungs, and the whole vital organs, from which he died in about 45 minutes after being struck; that when seen by a physician 20 minutes after being struck he was in a comatose state and dying and was not con-cious of anything; that it was usual to run such light trains ahead of the regular passenger trains, the engine and caboose returning north from hauling a load south, and for another load south, it being safer so to run such trains ahead of rather than behind the passenger trains, and that it was not customary
71 to give any notice to the public of such train movement except by whistle and bell as it approached stations, road crossings, &c.; while there was some conflict in the evidence as to the rate of speed of said engine and train as it passed stations, and as to whether the engine bell was rung as it approached said station, and as to said J. C. Hendri-ks being intemperate and under the influence of liquor when killed, and as to his carelessness in

crossing the railroad tracks in front of approaching trains, yet that offered by plaintiff on each point largely preponderated over that offered by defendant and showed that said engine and train
72 were run through said station at a very high and dangerous rate of speed without proper and continuous signals by bell and without slackening its speed on the time of the regular passenger train that regularly slowed down in approaching and stopped at said stations, and that said J. C. Hendricks was not addicted to drink and was sober and not under the influence of liquor when killed and was a careful and prudent man and not careless about crossing the track in front of trains.

This was all the evidence. After the evidence was all in and before the court had charged the jury the defendants re-
73 quested the court to charge the jury as follows:

Def'ts' Request to Charge.

If you find from the proof that said J. C. Hendricks was rendered unconscious at the moment he was struck by the engine that killed him, and that he did not regain consciousness, but remained so unconscious till his death, an hour or so thereafter, and if you further find from the proof that in this unconscious condition he was not sensible of mental or physical pain or suffering, then you cannot, in any estimate of damages you may find plaintiff entitled to
74 recover, include anything for such pain or suffering that he was not sensible or conscious of.

(Refused because already charged.)

2. If you find from the proof that said J. C. Hendricks and defendant's employés on the engine and train that killed said Hendricks were both in fault or wanting in proper care in their collision, and that his fault or want of proper care was equal, that both were in mutual fault, then plaintiff cannot recover.

(Refused because already charged.)

3. In order to entitle plaintiff to recover you must be satisfied from the proof that said J. C. Hendricks was struck and killed
75 by defendant's *en* engine through or because of the neglect of defendant or its employés operating its engine, and if you so find and also find that said J. C. Hendricks — also wanting in proper care for his own safety at the time and under the circumstances which contributed to his injury and but for which the accident would not have occurred, then you must consider which was the greater in fault. If you find them equally wanting in care plaintiff cannot recover, but if defendant's fault was the greater you must still offset the want of care you find said Hendricks chargeable with, and by so much mitigate or lessen the amount which
76 otherwise plaintiff would be entitled to.

Refused because substantially charged.

4. If you find from the proof that the engine and train that killed said J. C. Hendricks were owned and operated by defendant N. N. and M. V. Co., and by that company's engineer, &c., and that that company was then in possession and operation of the railroad,

and if there is no proof before you to show that defendant C., O. & S. W. R. R. Co. had anything to do with the matter either as owner or operator of said railroad, engine, or train, or as the employès of the engineer, &c., then your verdict should be given in favor
77 of the defendant C., O. & S. W. R. R. Co., whatever you may find as to the other defendant, N. N. & M. V. Co., because of its neglect or that of its employés.

Refused.

5th. If you find from the proof that said J. C. Hendricks was familiar with the railroad tracks, platformes, &c., and the approaches thereto at the place where he was injured; that he knew that the train was approaching and would cross the passway on which he was about to cross the track on which the approaching train was running, then it behooved him, before going upon said track in front of such approaching train, to see that he could probably do so before the train reached there. If he had heard the
78 signals of the trains approach, or in any other way knew it was coming and would cross his pathway before it stopped, according to the usual custom, then before he went on its track he should have used his senses and reasonable care to ascertain that he could cross ahead. If he failed so to do, and because of such failure was injured, then plaintiff cannot recover.

Charged with modification "reasonable care," inserted above.

6th. The rule requiring railroad companies to provide safe and proper accommodation for persons transacting business with its trains, about its depots or stations, does not imply that its
79 traines cannot be run over its tracks through or past such depots, nor that they will be so run as that such persons can pass across its tracks in front of such traines, after proper signals have been given and heard of the traine's movement, with assurance of safety, and persons rightfully about such depots, hearing and knowing of a traine's approach, must use proper "reasonable" care, and "in crossing ahead of an approaching train" see that their crossing of the track ahead of the approaching train is clear.

Charged with modification in quotation.

7th. If you find from the proof that said J. C. Hendricks
80 left no widow, child, or other dependent next of kin; that his next of kin are brothers and married sisters who were not dependent on him and who sustained no pecuniary loss because of his death, then if you find plaintiff at all entitled to recover because of defendants' neglect, still you cannot in your estimate of the amount he is entitled to include any sum compensation to such next of kin who had sustained no pecuniary loss.

Refused.

8th. Oour statute now allows a recovery by an administrator, &c., for the wrongful acts, fault, or omission causing the death
81 of his intestate—that is, allows the administrator to sue just as the decedent might have done had he not died of his injury, and in such case the administrator can recover for lost time, mental and physical suffering, expenses incurred because of the in-

jury, and then further an element that the deceased could not have sued for—that is, the damages done the next of kin.

By lost time is meant such time as the injured party was disabled or the time lost about his business, and under this head you cannot value the remainder of the life that was lost and at the same time consider damages sustained by surviving next of kin, for that
82 would be a double assessment for the same matter. What the deceased, had he recovered from his injuries instead of dying, could have recovered for lost time should be considered by you, together with his expenses caused by his injury, mental and physical suffering that he was sensible or conscious of, and then whatever loss of a money interest his next of kin sustained because of his taking away.

Refused.

9th. There is no statute rule in Tennessee prescribing the rate of speed at which railroad trains may be run, nor requiring that they shall be run slower through stations than between depots.
83 The law requires that proper signals of their approach to the public places and road crossing shall be given, and that persons hearing such signals shall heed them. Beside this the railroad Co. has no right to run its train through public places at a reckless rate of speed without signals, & should — do so & injury result the company must make compensation for any injury that results from such reckless-ess.

Refused because charged in substance.

The court charged the jury as follows:

Charge of Court.

GENTLEMEN OF THE JURY: The plaintiff, as adm'r of J. C.
84 Hendricks, deceased, sues the defendant- C., O. & S. W. R. R. Co. and The N. N. and M. V. Co. to recover damages for the alleged killing of his intestate by defendants' locomotive while being run — said road in the town of Trimble, in this county, on the 12th day of December, 1887. The ground of action as set out in the declaration is, in substance, that defendants have control of a railroad running through this county and by or through the town of Trimble; and on the 12th day of December, 1887, while they were in possession of said road, operating the same, a locomotive attached to a caboose or train of cars, and — charge of defendants' agents and servants, was run so
85 negligently and carelessly as to collide with plaintiff's intestate, causing his death. The defendants admit or do not deny the killing, but claim that the death was caused by deceased's own groos neglect, or that his negligence was the proximate and direct cause of the death and not the negligence of the defendants, or that, if the defendants were guilty of some negligence in running their train of cars at too high a rate of speed at the time of the accident, the deceased, by the failure to exercise ordinary caution and what reasonable prudence would have dictated under the circum-

stances, was guilty of as great, if not greater, negligence or such
86 inexcusable negligence or conduct as relieves the defendants from responsibility for the accident. The duties of the railroad, while running trains in this State, are prescribed by statute, and in addition to these statutory duties there are common law obligations or duties devolving upon them, for the non-observance of which in particular cases, when damage or injury results to others and negligence can be imputed to them, they will be held liable, though the negligence does not consist in the failure to do some act required by the statute. The statute says that while trains are being run on the road there shall be some person, either
87 engineer or fireman or some other person, always on the lookout ahead, and when any person, animal, or other obstruction appears on the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to prevent an accident and stop the train; but these duties of sounding whistles and putting down brakes and using all possible means to stop the train have no application and are not required unless the person or object or other animal appears as an obstruction—that is to say, it must be seen by the lookout, who is required to be vigilant in the exercise of his duty on the road in such a way as to be struck by the
88 train unless removed before any of these duties arise and have to be performed. If the object cannot be seen by a vigilant outlook, though it is struck by the train, whether person or animal, the company would not be liable for a failure to sound an alarm whistle or to put down brakes or to do any other act to stop the train. So if the person should come on the road immediately in front of the locomotive of a moving train suddenly and without warning and though seen at the moment, yet before struck by the train, the engineer has not sufficient time to sound the whistle or put down brakes or do any other act toward stopping the
89 train, the company would not be liable for damages for the injury because they failed to do any of these acts.

If, however, the obstacle appears and the engineer has time to perform some of these acts, though not all of them, and he fails to do any of them, then the company would be liable because of the failure to perform such of them as he could. If the proof in the case shows the deceased was killed by the defendants' locomotive while in motion by the deceased coming suddenly upon the road immediately in front of the locomotive while the train was going through the town of Trimble, and he was either not seen at
90 all or only for a moment before he was struck and killed and before the engineer had time to sound a whistle or apply brakes or to do any other act to stop the train, then the company would not be liable by reason of a failure to perform any of the statutory duties. If the facts are as I have stated them, the company, if liable at all, must be found liable for some negligence which would make them responsible at common law; and if the deceased was killed by the train of the defendant company the burden of proof is on the company to show that they have observed the pre-

cautions of the statute or as many of them as they could;
91 or if none, then a sufficient reason in law for not doing them.

It is claimed in this case that if the proof show that the railroad company constructed its platform for passengers on the side of its track opposite the depot, making it necessary for all persons having business with the road, such as the express agent and mail agent or postmaster, to cross over the track in front of the engine to deliver his express matter or mail to the road, and constructed a crossing for said purpose, that this would be negligence in the company. It is also claimed that if the proof show there was a section-
92 house built by the company near the depot and its line of road so as to obstruct the vision of the engineer while on a running train going north towards the town and prevent him, at any point of time, from having a clear and unobstructed view of the point from which persons having business with the train would cross the road to the platform, or if the proof show that the trains of cars were allowed to stand on the side track or stacks of lumber allowed to be placed on the side of the road in such way as to obstruct the vision from persons going from the town to the crossing who might have business with the train, that all such matters and
93 acts would be negligent in the company. The court does not consider it necessary or material to say whether such acts and facts, if true, would be acts of negligence in the company, for, standing by themselves and isolated from other facts and circumstances, they would furnish no reason to make the company responsible for a killing of any person at the crossing. The business of the company and necessity of trade might make them necessary. If, however, the company construct such a crossing for persons having business with it to cross its line of track, and if there be proof showing them as such obstructions at or near its crossing as to intercept
94 the vision of an engineer approaching the crossing going north and make it dangerous to persons to pass that place at a high rate of speed, then it would have been his duty to have checked the speed of his train while passing said crossing so as to avoid such dangers, and a failure to do so would be an act of negligence.

If the proof show that the particular train that killed the deceased was a section of the regular passenger train or was called sometimes a wild train and was running on the time of the regular passenger train, making no stops, and the station where the
95 killing occurred was the regular station where the train stopped and where the express matter and the mail was delivered, then it was the duty of the engineer on such section or wild train, when there was reason to apprehend that his train might be mistaken for the regular passenger train, to observe great caution for that reason in approaching said crossing, and the measure of caution would be in proportion to the danger. If the proof shows said engineer sounded his whistle and approached said crossing at a high rate or considerable rate of speed, and if the proof further show that the deceased supposed it was the regular passenger

96 train and he discarded the steps at the place provided by the company for persons having business with the company to cross the road, having his mail bags and express matter, and if the proof further show that by reason — obstruction from cars on side track the deceased could not see the approaching train until he was very near the line of crossing the track, and if the proof satisfy you that the deceased attempted to cross the line of track in front of the engine and in doing so, in view of all the facts, you believe he exercised reasonable prudence and caution and was killed by the engine, and if you are further satisfied that he would
97 not have been killed and would have had sufficient time to have crossed over had not the train been going at a very considerable or high rate of speed, then the company would be responsible. If the deceased heard the train and saw it or had opportunities for seeing it after he heard it, and if in the exercise of ordinary prudence he could have avoided the danger and did not do so, but attemp-ed to cross the line of the track in front of the nearing locomotive without proper or ordinary care, then the deceased would have been guilty of such negligence as would prevent a re-
98 covery in this case; and this would be so although you should believe the engineer was guilty of negligence; also in running at a high rate of speed, too high under the circumstances. The law does not regulate the rate of speed at which a train should be run on railroads in this State. They can run at such rate generally as they see proper, consistent with the safety of their passengers, and negligence generally cannot be predic-ted on the fact that the company ran its train at a high rate of speed. There may be cases in which injury is done to others growing out of too high rate of speed, producing accidents which under circumstances of
99 that case would be negligence in the company. Each case depends upon its own facts. That railroad companies in this State have the right to run special trains in addition to the regular trains and on the time of regular trains and to pass stations or regular stopping places without stopping at such stations or *or* giving notice to the public, other than signals, such as *a* sounding bells or blowing whistles, that such trains would be run, and acts of this character are not acts of negligence in themselves. Having a general right to operate and run trains on their roads, the right
100 to judge of such necessity in such cases is left to the discretion of the company. If they run their trains in a negligent and careless way & in doing so injure others, of course they are liable like other persons who by negligence and careless conduct inflict unneceessary injury on others. The negligence which charges a party with responsibility for an act which it is alleged has resulted fatally to another is limited or confined to the question wheather it is the direct or proximate cause of the injury. In cases where both parties are guilty of negligence, and to the same degree, there can be no recovery. If the defendant in this case, under the proof,
101 in your opinion, was guilty of such negligence as was the direct and proximate — of the death, then the company would be responsible. If, notwithstanding this fact, you should also be-

lieve the deceased was also guilty of same negligence that contributed to the injury, though not the direct and proximate cause of the death, then it would be your duty, in assessing damages against the defendant, to take into consideration the contributory negligence of the deceased in reducing or mitigating the damages. If, however, you should be of the opinion from the proof that the death of the deceased was the consequence of his own act
102 as the direct and proximate cause, in failing to exercise proper care and prudence in the preservation of his life, though you should also be of the opinion that the defendant was guilty of some negligence as a contributory cause, then the plaintiff cannot recover; and in determining the questions with a view of fixing the responsibility for the accident, it is your duty to look to all the facts surrounding the parties at the time.

Was the signal sounded the station; if so, at what place and how often; or was the bell rung? At what rate of speed
103 was the train going; or was every precaution used by the engineer to give notice of the coming train? Were there any impediments or obstructions in and around the depot and surroundings to prevent seeing the train by any person having business with it? Did the deceased hear it, or was his attention called to it, & was his employment and his business such that by the exercise of ordinary care and prudence he could have informed himself of the train and avoided the danger incident to crossing the track on its approach? The habits of the deceased in being careful generally or as manifesting the want of care for his personal
104 safety in crossing tracks in front of moving engines, all facts of this kind, are to be considered and weighed by you in deciding whether his death was the result of his own rash and negligent act or the immediate, direct, and proximate cause, or whether the company was guilty of negligence and of such negligence as was the direct, immediate, and proximate cause. If you find the first to be the fact, then the pl'ff cannot, as I have said, recover. If you find the last to be the fact, then plaintiff will recover, and if entitled to recover the damages will be assessed, as I have stated—that is to say, if the deceased contributed to the accident, that fact ought to have the proper
105 weight in reducing or mitigating the damages. The statute lays down the rule in assessing damages when the plaintiff is entitled to recover, and when the suit is for damages consequent upon death caused by wrongful act of another the plaintiff can recover for mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries. The capacity of the deceased for making money, his business habits, his expectancy of life, &c., are to be considered on this point. As to mental and physical suffering, it is claimed that the proof
106 shows that the deceased was so injured by the collision as to become at once entirely unconscious of suffering, and remained so until death; then there could be no damages for physical and mental suffering. It is a question of fact for you to say if after the injury received by the deceased he was conscious and did suffer physical or mental pain. If he was not, of course there could

be no recovery for such damages while the injured person was in such condition. If, however, he was conscious and could feel and suffer pain the plaintiff could recover for such suffering. By
107 loss of time, when death ensues in a short while after receiving an injury, is not meant the mere interval between the period when the injury is received and the death. In cases of this character the adm'r recovers to the extent that the deceased could have recovered had his injuries resulted in total disability instead of death, which would be for the whole period of his reasonable expectancy of life at the time he received the injury, and in computing that value you have to consider the capacity of the deceased to earn money douring that expectancy of life, his habits of industry, age, physical condition, present health, or any other
108 circumstances in his life or habits that might prolong or shorten life, so as to arrive at his reasonable expectancy of life; and to this, as I have already said, he would be entitled to recover for mental and physical suffering as I have explained, if such element exists. If you find for the pl'ff you will assess the damages on the basis I have explained to be recovered, or mitigated as I have already stated and explained, by such amount as you may think right & proper, dependent upon the amount of negligence the deceased was guilty of as contributory cause, if you
109 find any such negligence in the proof on his part. If you find for the def't your verdict *bill* be for the def't.

And thereupon, the jury having returned their verdict for $15,000.00 and judgment being rendered thereon, the defendant moved the court for a new trial as follows:

Motion — New Trial.

In this cause The N. N. & M. V. Co., defendants, moves the court for a new trial because of error in the court in refusing to transfer & remove this cause to the circuit court of the United States as heretofore petitioned and moved by this defendant, and both defendants move the court to set asid- verdict and grant them a new
110 trial because said verdict — excessive and not supportable by the evidence; because the damages assessed by the jury are excessive; because of errors in the court in instructions given the jury in the charge; because of error in the court in refusing to charge the jury as requested by defendants; because the verdict is not supported by the evidence and is against the great weight of the evidence; and this motion being overruled, defendants excepted & tendered this their bill of exceptions to the action of the court in refusing to transfer this cause on the petition of the defend-
111 ant N. N. & M. V. Co. heretofore to the U. S. circuit court, & in disallowing their motion for a new trial, because said verdict is excessive & not supported by the evidence & against the great weight of the evidence, as well as because of error of law in the charge given to the jury & in refusing to charge the jury as requested by the defendants, &c.

And, their motion being overruled, defendant excepted and tendered this their bill of exceptions, which are signed & made a part of the record, and defendant prayed an appeal to the next term of the supreme court, at Jackson, Tenn., which is granted on
112 their making bond as required by law.

THOS. J. FLIPPIN, *Judge, &c.*

Bill of Cost.

State tax	2 00
Clerk's fees:	
Docketing, .30; pros. bond, .25; summons, .75; 52 spr's, 5 20; declaration, .25; 2 pl-as, .50; counterp. summons, .75; motion to remove cause, .25; ans. to same, .25; order refusing same, .25; bond for removal, .25; affidavit thereto, .25; motion new trial, .25; order refusing same, .25; 50 written probate, 2.50; 2 copies interrogatories & cross-interrogatories for dep's H. Brewer *et al.*, 5,500 words, 5.50, 2 certificates thereto; filing notice for same, .25; deposition H. Brewer, 1.00; certificate & official seal (F. R. Higgins), 1.25; deposition Josh. Houston, 1.00; certificate, seal, & postage (J. P. Caldwell), 1.25; 2 continuances, .50; jury, .10; judgment, .75; appeal
113 supreme court & bond, .75; this transcript, 21.00; certificate hereto, .25; seal, .50; bill cost & copy, .75	47 85
Sh'r'ff fees:	
W. G. Dyer, summons, 1.00; 3 spr's, .75	1 75
B. P. Dyer, 34 spr's, 8.50; 1 notice, .25	8 75
A. J. McLurdon, counterp. summons	1 00
Written fees:	
F. P. Lawrence, *per diam* & mileage	5 64
J. C. Evans, " "	8 60
J. H. Pollock, " "	10 32
B. P. Dyer, " "	3 36
Dr. J. C. Smith, " "	5 64
E. E. Parks, " "	7 64
J. S. House, " "	7 40
G. W. Elliot, " "	8 00
Andrew Walker, " "	8 00
Nathan Norman, " "	12 60
C. H. Hendricks, " "	5 64
W. J. Pierce, " "	7 64
F. A. Pierce, " "	5 64
W. H. Baker, " "	7 88
T. J. Epperson, " "	3 36
J. P. C. Walker, " "	1 00
A. H. Blain, " "	8 00
John Needham, " "	8 00

	W. M. Eepperson, *per diem* & mileage		2 39
114	Thos. Kenard, " "		5 36
	Joe Jones, " "		5 64
	P. E. Tichenor, *per diem* & mileage		5 80
	Gus. Meadows, " "		5 44
	J. M. Kenard, " "		6 64
	Geo. Stine, " "		6 90
	Dave Shaw, " "		2 00
	H. V. C. Wynne, " "		3 00
	J. R. Blain, " "		3 36
	W. L. Holloman, " "		1 00
			$233 21

Cleark's Certificate.

STATE OF TENNESSEE, }
Dyer County. }

I, F. C. Gordon, cleark of the circuit court for Dyer county, Tennessee, do certify that the foregoing is a true and perfect transcript of the record and bill of cost remaining in my office in the
115 case of M. R. Hendricks, adm. of J. C. Hendricks, dec'd, *vs.* N. N. & M. V. Co. & C., O. & S. W. R. R. Co.

Given under my hand and seal of office this 4th day of March, 1890.

F. C. GORDON, *Clerk.*

116 In the Supreme Court of Tennessee at Jackson, April Term, A. D. 1890.

THE CHESAPEAKE, OHIO & SOUTHWESTERN R. R. Co. and THE NEWPORT NEWS & MISSISSIPPI VALLEY CO. }
vs.
M. R. HENDRICKS, Adm'r of J. C. Hendricks. }

Statement of Case.

This action was begun in the circuit court of Dyer county by plaintiff, the brother and administrator of J. C. Hendricks, who was run against and killed by a train on the railroad near Trimble, Tennessee, Dec'r 12, 1887. At and for some time prior to his
117 death said J. C. Hendricks, then aged about 33 years, was the postmaster and express agent at Trimble. The post office and express office was some 70 yards east of the railroad tracks, and his approach from his office to the station platform was such as that therefrom he could not see a train approaching from the south until after crossing the side track and when within four or five feet of the rails where he was killed. The platform to or from which mail and express matter was received and delivered was on the west side of the railroad track; the side track, depot, post office, etc., were

all east of the main line and platform, and it was necessary
118 for the deceased to cross these tracks in order to get to the platform for attending to his business as postmaster and express agent with any passing train. The record shows, and it is not controverted, that on the day of his death the deceased had nearly been run over by a south-bound train an hour or so before his death, and just before his death, hearing another train approaching, it being then about time for the mail train to pass, he went from the post office toward the station platform with mail and express matter, and as he passed the side track, on which some cars were standing, without stopping or looking to see how near the ap-
119 proaching train was, passed heedlessly on the main line and was struck by an engine and caboose that was running ahead of the mail train and instantly killed. I say instantly killed—the proof shows that his skull was badly crushed, his brain exposed and contused, his body fearfully bruised and mangled, and while he continued to gasp and breath- some 45 minutes, yet that he was never conscious after the blow was inflicted.

The proof shows that this engine and caboose were running through the station at a very rapid rate, perhaps 30 miles an hour, and the negligence alleged against the R. R. Co. is this rapid running of the train on the time of the passenger train that
120 would stop at the station and over the crossing where the deceased and the public were in the habit of passing to meet and transact business with such regular trains.

The record shows that the deceased was sometimes careless in crossing the track in front of trains, and had been warned against the risk of so doing; that an hour before his death a passenger train, stopping there and passing over this crossing very slowly, almost ran over him, hurting his foot. (Record, page 52.)

The deceased was unmarried and without child or children. His next of kin were brothers and sisters, who were not dependent upon him. He left no estate, and, while, as shown by the record,
121 a man of fair business capacity, was of free-and-easy habits, and had accumulated nothing.

The verdict of the jury was for fifteen thousand dollars damages.

The record shows that prior to the commencement of this suit the plaintiff sued these same appellants in said circuit court, and, for good reason, before the return day dismissed his suit against the C., O. & S. W. R. R. Co. and proceeded with his declaration alone against the Newport News & Mississippi Valley Company, which company, being a non-resident of Tennessee, removed that cause to the United States circuit court. Thereafter the plaintiff dis-
122 missed that suit in the Federal court and began the present action. Thereupon the Newport News & Mississippi Valley Co. petitioned the State court for the removal of this cause also into said Federal court, and its petition, bond, etc., in that respect are in the record (p. 20). The circuit judge refused to grant the removal thus prayed for and proceeded with the case, retaining jurisdiction thereof. (Record, page 31.)

The bill of exceptions sets out a synopsis only of the evidence, parties agreeing as to what it showed. (Record, page 41.)

Assignment of Errors.

Appellants assign error upon this record as follows:

123 1. Error of the trial judge in refusing to transfer and remove this cause to the circuit court of the United States according to the petition and motion therefor by the Newport News & Mississippi Valley Co.

2. Because the verdict is excessive and is not supported by the evidence.

3. Because of error in the trial court in refusing to charge the jury as requested by appellant- in their third request. (Record, pages 56 and 57.)

4. Because of error in the trial court in refusing to instruct the jury as requested by appellants in their fourth request for special charges. (Record, pages 57 and 58.)

5. Because of error in the trial judge in refusing to charge
124 the jury as requested by appellants in their seventh request for special instructions. (Record, pages 60.)

6. Because of error in the trial judge in instructing the jury as to the measure of damages as follows:

"The statute lays down the rule in assessing damages when the plaintiff is entitled to recover and when the suit is for damages consequent upon death caused by wrongful act of another. The plaintiff can recover for mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries. The capacity of the deceased for making money, his business habits, his expectancy of life, &c., are to be considered
125 on this point. As to mental and physical suffering, it is claimed that the proof shows that the deceased was so injured by the collision as to become at once entirely unconscious of suffering, and remained so until death, then there could be no damages for mental and physical suffering. It is a question of fact for you to say if after the injury received by the deceased he was conscious and did suffer physical or mental pain. If he was not, of course there could be no recovery for such damages while
2 Heisk., 584. the injured person was in such condition. If, how-
9 " 841. ever, he was conscious and could feel and suffer pain,
6 " 174. the plaintiff could recover for such suffering. By loss of time, where death ensues in a short while
126 after receiving an injury, is not meant the mere interval between the period when the injury is received and the death. In cases of this character the adm'r recovers to the extent that the deceased could have recovered had his injuries resulted in total disability instead of death, which would be for the whole period of his reasonable expectancy of life at the time he received the injury, and in computing that value you have to consider the capacity of

the deceased to earn money during that expectancy of life, his habits of industry, age, physical condition, present health, or any other circumstances in his life, or of habits that might prolong or
127 shorten life so as to arrive at his reasonable expectancy of life; and to this, as I have already said, he would also be entitled to recover for mental and physical suffering, as I have explained, if such element exists." (Record, pages 77, 78, & 79.)

7. Because of error of the trial judge in refusing to charge the jury as requested by appellants in their sixth request for special instructions. (Record, page 59.)

8. Because of error of the trial judge in refusing to charge the jury as requested by appellants in their fifth request for special instructions. Record, page 58.

9. Because of error of the trial judge in refusing to charge the jury as requested by appellants in their seventh request for special instructions. (Record, page 60.)

128 The petition filed for the removal of this cause from the State to the Federal court upon its face stated a good cause for removal. It alledged that the plaintiff had no cause of action whatever against the C., O. & S. W. R. R. Co. and had fraudulently made that company a defendant to his suit solely for the purpose of thereby defeating the petitioning defendant in its right to the removal. It stated that plaintiff had previously sued these same parties about this same matter, but, admitting want of cause of action against the C., O. & S. W. R. R. Co., had dismissed that former suit as against it and proceeded with his declaration alone against
129 the N. N. & M. V. Co., whereupon the latter had removed that proceeding to the Federal court, and the case had been pending in that tribunal, but was dismissed by the plaintiff on beginning this action solely for the purpose of in this way defeating the jurisdiction of the Federal court. The petition alledges utter want of cause of action by plaintiff against the resident defendant, C., O. & S. W. R. R. Co., it not having been in possession, control, or operation of the railroad on which plaintiff's intestate was injured for two years or more prior to the killing and the injury complained of having been inflicted alone by the N. N. & M. V. Co. and its employés with its train. On the face of this petition, as I
130 have said, a good cause for removal was stated. Wheather the facts were correctly stated or not could be enquired of alone in the Federal court. The sole question upon this petition for the State court to determine was wheather upon the face of the petition a good cause for removal was made. If so, then the removal was a matter of right and of course, subject, however, only to an enquiry in the Federal court as to the truth of the allegations of the petition.

Stone *v.* S. Carolina, 117 U. S., 430.
Carson *v.* Hyatt, 118 U. S., 279–287.

The petition being in proper form and accompanied by sufficient bond, all jurisdiction of the State court over the subject-matter of

the litigation ceased, and all other proceedings by the State
131 court are void.

R. R. Co. *v.* Miss., 102 U. S., 135.
Kern *v.* Huidekoper, 103 U. S., 485.
R. R. Co. *v.* Koontz, 104 U. S., 5.
Davis *v.* S. Carolina, 107 U. S., 597.
R. R. Co. *v.* White, 111 U. S., 134.
Gordon *v.* Sangest, 16 Purs., 97.
Kanouse *v.* Martin, 15 Howard, 198.

No order of the State court is necessary to complete the removal if the petition is sufficient on its face and is accompanied by a proper bond.

Kern *v.* Huidekoper, 103 U. S., 485.

The petition being sufficient on its face and the bond in accordance with the law, all jurisdiction of the State court ceases absolutely and the jurisdiction of the Federal court attaches, and all after proceedings in the State court are absolutely null.

132 Steamship Co. *v.* Yugman, 106 U. S., 118.
R. R. Co. *v.* Koontz, 104 U. S., 5.

Other cases in large numbers might be cited in support of these propositions, but it seems to me unnecessary. If the allegations of the petition for removal are true, then the N. N. & M. V. Co. was entitled to have this case sent to the Federal court, and these allegations are simply that the defendant is a corporation non-resident of Tennessee and a citizen of Connecticut, is sued by a citizen of Tennessee in one of its courts, and that such plaintiff, for the single purpose of defeating the jurisdiction of the Federal court, where, indeed, his suit with the petitioning defendant about this very matter had been pending, issues joined, and trial about to be
133 had, had dismissed his former suit in that Federal court and had brought the present action in the State court, making a resident of the State codefendant with the petitioner, having no cause of action whatever against such resident defendant and making it a party for the sole purpose of defeating the right to remove. Now, if these facts were true—and enquiry as to their truth could be had alone in the Federal court—then the removal should have been had, and if this be true all of the proceedings in the State court were absolutely void.

The case made in this removal petition is not that of one
134 of two defendants sued jointly for a tort, the removing petition alledging a severable controversy, as was the case in Pirie *v.* T. V. E. D. T., 115 U. S., 41; Sloan *v.* Anderson, 117 U. S., 275; Plymouth Co. *v.* Amador Co., 118 U. S., 264; Thorn Hedge Co. *v.* Teller, 122 U. S., 535, but it is simply a question whether the plaintiff can join a resident defendant against whom he has no cause of action in this suit against the real tort feasor, who is a non-resident, simply for the purpose of thereby wrongfully and fraudulently preventing a removal to the Federal court and defeating the rightful jurisdiction of the —.

A case distinctly in point is that of R. R. Co. *v.* Wangling, in 132 U. S., 591, 601, 603.

II.

This assignment of error is because the verdict is excessive
135 and not supported by the evidence. Plaintiff's intestate was an unmarried man, left no dependent relatives, and his next of kin collaterals. The decedent had not at the age of thirty-three years, with all his business qualifications, earned *not* a single cent. He died penniless. The only assets that have come to the hands of his administrator are $55.00 from his father's estate. Death was practically instantaneous on the collision. Physical pain and mental anguish were not suffered. The charge of the trial court limited the jury to compensatory damages and excluded from their consideration exemplary or punitive damages. Under these circumstances I insist that the verdict is excessive and is not supported by
136 the evidence. The next of kin sustained no loss by this death. It is a gain to them rather than a loss. The value of the life lost to the decedent should not be taken as the basis of estimating damages, for if so, then the beneficiaries get plainly what the statutes did not intend they should have—that is, get compensation for that they had not suffered. In Kentucky and other States the value of a life lost under these circumstances is limited to the wage-earning capacity of the deceased intermediate the injury and death which was disabled.

Hansford *v.* Page, 11 Bush, 380–385.

Besides, although there was proof tending to show decedent
137 of careless habit, as instanced by his being struck by another engine running very slowly an hour previous, as well as by his coming quickly from behind the depot, etc., and standing cars on the side track in front of the engine that killed him, then only 100 feet distant, and, without checking or looking, walked on the track almost under the engine, yet with all this contributory neglect, with no question — punitive damaged nor of loss to survivors nor of physical pain or mental anguish to consider in their estimate of damages, the jury assess $15,000.00 for a life that up to 33 years of age had earned no net money.

Fifteen thousand dollars would have been a full assessment
138 for pain and anguish, loss of support to survivors and exemplary damages added, when, too, there was no contribution on the part of decedent.

I submit that it cannot be justified where, as in this case, but a single element of damage, the value of the life lost, exists.

R. R. Co. *v.* Prince, 2 Heisk., 584.
R. R. Co. *v.* Smith, 6 " 175.
Collins *v.* R. R. Co., 9 " 850.
R. R. Co. *v.* Connor, 2 Baxter, 382.
Dash *v.* Fitzhugh, 2 " 307.
R. R. Co. *v.* Fleming, 14 Lea, 128.

III.

Error of the trial judge in refusing appellant's third request for instruction to the jury lies in the refusal to charge as to mutual
faults. The charge as given fails to set forth the rule as to
139 mutual fault and contributory neglect in mitigation or as offset.

This request was offered for the purpose of guiding the jury between these rules, and the refusal to so instruct was error.

IV.

This assignment of error rests on the decision of this court in—
R. R. Co. *v.* Carroll, 6 Heisk., 347.

There is no proof tending to show that the injury was inflicted alone by the employees and engine, etc., of the N. N. and M. V. R. R. Co., and that the C., O. and S. W. R. R. Co. had nothing to do with the matter, and *and* the defendants were entitled to have the jury told that only the one doing the wrong would be liable therefor and the other be not liable.

V.

140 By this assignment of error appellant complains of the refusal of the circuit judge to say to the jury that they should not, in estimating damages, allow anything as compensation to collateral and non-dependent relatives who have not suffered loss.

Until the act of 1883 damages in such actions *was* limited to what the decedent might have recovered as though utterly disabled, yet death had not ensued. By that statute the further element of damages may be considered when the proof shows it to exist—that it is the pecuniary loss of dependent survivors, not their wounded feelings.

R. R. Co. *v.* Stephens, 9 Heisk., 18.
Trufford *v.* Ex. Co., 8 Lea, 105.
R. R. Co. *v.* Toppins, 10 Lea, 58.
Act of 1883, chapter 186.

141 The circuit judge refused to say to the jury that when the next of kin were not dependent on the decedent, had suffered no pecuniary loss because of his death, nothing could be allowed as damages for their loss, there being no loss.

It needs no argument or authority to show this to be error.

VI.

This assignment is upon the theory that the charge given states every element of damage for which the jury under any proof might allow plaintiff to recover, and does not state the *contra* view as to how these elements are to be shaded if the proof shows their non-existence (excepting as to unconsciousness).

Especially is this true in the charge as to what the deceased

might have recovered, the value to him of the life lost, his
142 power to earn money, etc. Excepting proof that decedent, as postmaster and express agent at the unincorporated village of Trimble, received some salary, there is no evidence as to his capacity to earn money, since the fact that at 33 years of age, without dependent relatives to consume his earnings, he had neither money, lands, stock bonds, or other property. The jury were not given this *contra* side of the ledger of his life value.

R. R. Co. *v.* White, 5 Lea, 440.
R. R. Co. *v.* Prince, 2 Hirsk., 584.
R. R. Co. *v.* Stucker, 2 Pickle, 353.

Under this assignment the eighth request of appellants should also be considered. That, too, was refused.

VII.

This assignment of error is on the refusal of the trial judge
143 to charge the jury as to the care the decedent should have exercised when going over a point of danger—hearing and knowing the train's approach. It is not enough to charge that decedent should have used ordinary care. Rather under those circumstances was a high degree of care, extraordinary care, required. He should have stopped or looked or listened. He could not rightfully rush headlong into danger knowing its presence and take no care.

Improvement Co. *v.* Stead, 95 U. S., 164.
R. R. Co. *v.* Gorty, 79 Ky., 449.
" " " *v.* Houston, 95 U. S., 697.
Parker *v.* R. R. Co., 84 N. C., 118.
R. R. Co. *v.* Hoel, 12 Bush., 45.
Express Co. *v.* Nicholls, 3 N. J. Law, 439.
R. R. Co. *v.* Brackin, 14 A. and E. R. R. Cas., 691.
Lacy's Digest, vol. 2, 764.

VIII.

144 In this assignment of error I insist that the trial judge by inserting "reasonable" care modifies the request so as to leave the jury free from all guide. They were not told what is "reasonable," nor that under very perilous surroundings more would be required to constitute reasonable care than under other circumstances.

The jury should have been told what was required under the very circumstances shown by the proof, there being no conflict of evidence as to the danger of the place.

R. R. Co. *v.* Smith, 11 Hirsk., 457.

IX.

Appellant assigns error on the refusal of the trial judge to instruct the jury not to assess damages both for the pecuniary
145 value of the life lost to the deceased and to the next of kin. The proof showed that life had no net value—that is, that

decedent, though without family or dependent relatives, spent all the handsome salary that his post office and express agency brought him, and at 33 years was not worth a cent. His administrator found no assets. His next of kin admittedly suffered no pecuniary loss; were not dependent on him. Now, appellant was entitled to have the jury told not to add together these two elements. One was enough, especially as neither existed and both were wanting. Yet the trial judge refused.

See authorities above.

This record shows, as it seems to me, a wild, extravagant assessment of damages—vindictive damages, with vindictiveness. Now, defendant——

146 relatives made rich, though sustaining no loss—a life that was without money value estimated a hundredfold above the average of even the small per cent. of men who do not die penniless; and I submit the case in confidence of appellants being entitled to a reversal.

HOLMES CUMMINS,
Att'y for Pl't'ff in Error.

In the Circuit Court of Dyer County, Tennessee.

M. R. HENDRICKS, Adm'r of J. C. Hendricks, Dec.,
vs.
NEWPORT NEWS AND MISSISSIPPI VALLEY CO. and CHESAPEAK-, OHIO AND SOUTHWESTERN R. R. Co.

In this cause the defendant Newport News and Mississippi Valley Company, respectfully petitioning the court, shows:

147 (1.) That the matter and amount in dispute in this cause, exclusive of costs, exceeds the sum or value of $2,000.00, and is, to wit, the sum of $50,000.00.

(2.) That this is a suit of a civil nature, of which the circuit courts of the United States have jurisdiction in a controversy between citizens of different States, and that your petitioner at and before the commencement of this suit — and now still is a citizen of the State of Connecticut, U. S. A., and that the said plaintiff, M. R. Hendricks, adm'r, etc., as aforesaid at and before the commencement of this suit was and still is a citizen of the State of Tennessee; that this controversy is wholly between your petitioner and said plaintiff, citizens of different States, and can be fully determined as between them without the presence of other defendants.

148 (3.) Your petitioner further shows that, indeed, the said Chesapeak-, Ohio and Southwestern R. R. Co. is neither a necessary nor a proper party to this suit, and that the plaintiff has joined said railroad Co. as a defendant simply for the purpose of endeavoring to defeat your petitioner's right of removal of this cause to the circuit court of the United States for this district, and that said course of the plaintiff is fraudulent and an unjust and illegal attempt to deprive said United States court of its lawful jurisdiction

as well as a fraud upon said petitioner's right to have this cause removed to and tried in said United States circuit court.

(4.) Your petitioner says that heretofore, to wit, on the —
149 day of ——, 1888, the said plaintiff began in this court his action against said defendants for the same matters and things set forth and complained of by him in his declaration above in this cause, and that after beginning his said suit the plaintiff dismissed his said action against said C., O. and S. W. R. R. Co. and proceeded therein alone against your petitioner.

Thereafter, on the — day of ——, 1888, being one of the days of the March term, 1888, of this court, your petitioner filed in said former proceedings of plaintiff against it a petition for the removal of said cause from this court to the circuit court of the United States for this district, and your honor, at the July term, 1888, of this
150 court, granted the prayer of said petitioner and directed the removal or transfer of said former cause to said United States circuit court; that said former cause was proceeded with in said United States circuit c't and issue joined between the plaintiff and your petitioner, and that cause was about to be tried in said United States circuit court at Jackson, Tennessee, when plaintiff dismissed his said suit in that court of his own volition, having theretofore begun this present cause in this court against your petitioner and said Chesapeak-, Ohio and Southwestern R. R. Co., joining the latter herein, as aforesaid, fraudulently and for the single purpose of divesting said Federal court of its juris-
151 diction and depriving your petitioner of his right to have this cause tried and determined by said United States court, he having no claim whatever against said C., O. and S. W. R. R. Company.

(5.) That, as was and is well known to the plaintiff, said Chesapeak-, Ohio and Southwestern Railroad Company, defendant, was not on said 12th of December, 1887, and had not been since the 31st day of January, 1886, and is not in the possession, control, or operation of said railroad extending from Louisville, Kentucky, to Memphis, Tennessee, mentioned in the declaration, said railroad company, defendant, having on and prior to said 31st day of January, 1886, assigned, transferred, leased, and delivered possession of said railroad to your petitioner, who, on the 1st
152 day of February, 1886, entered into sole and exclusive possession and control thereof, and who, on and since said 1st day of February, 1886, continuously to this day (including said 12th day of December, 1887) and now is in the sole and exclusive control, use, and possession and operation of said railroad, controlling and operating same, through its own agents and employees, to the entire and total exclusion of said railroad company, defendant, who, on said 31st of January, 1886, entirely denu-ed itself of all possession and control as well as of the operation and use of said railroad.

These matters were well known to the plaintiff at and before the commencement of this action, and by his dismissal of
153 said former suit as against said railroad company, defend-

ant, in this court at its March term, 1888, the plaintiff admitted and confessed that he had no cause of action against that party, as well as that his sole right or cause of action was against your petitioner. As above stated, this controversy is alone between the plaintiff, a citizen of Tennessee, and your petitioner, a citizen of Connecticut, and the matters sued for and involved in said former suit of the plaintiff were and are identical with and the same as those sued for in this present action, and said C., O. and S. W. R. R. Co. is neither a proper nor necessary party to this suit, and the issue herein can be fully determined between your petitioner and the plaintiff without the presence of said other party.

154 (6.) Your petitioner offers herewith a bond, with good and sufficient surety, in the penalty required by law, for entering in the said circuit court of the U. S. for the eastern division of the western district of Tennessee at Jackson on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if this court shall hold that this suit was wrongfully and improperly removed thereto.

Wherefore your petitioner prays this honorable court to proceed no farther herein except to make the order of removal required by law and to accept of said bond and surety in the case *of* the record herein to be removed in the said circuit court of the U. S. in

155 and for the eastern division of the western district of Tennessee at Jackson; and as *ever* bound, etc.

LATTA, PARKS AND DRAPER AND HOLMES CUMMINS,
Att'ys for Petitioner.

STATE OF TENNESSEE, }
County of Dyer. }

I, Holmes Cummins, being duly sworn, say that — am the agent and the attorney of the petitioner, The Newport News and Mississippi Valley Company; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are full and true.

HOLMES CUMMINS.

Subscribed and sworn to before me on this 23 day of November, 1888.

M. T. BRACKEN,
Cir. C't C'k.

156 *Bond.*

HENDRICKS
v.
N. N. AND M. V. R. R. Co.

Know all men by these presents that we, the Newport News and Mississippi Valley Company, as principal, and Holmes Cummins, as surety, are hereby held and firmly bound unto M. R. Hendricks

adm'r of J. C. Hendricks, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such that if said N. N. and M. V. Co. shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the eastern
157 division of the western district of Tennessee, on the first day of its — session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of the county of Dyer and State of Tennessee, in which said J. C. Hendricks, adm'r, as aforesaid, is plaintiff, and said Newport News and Mississippi Valley Company are defendants, and shall do such other acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void; otherwise of force.

Witness our hands and seals this 23 day of Nov., 1888.

NEWPORT NEWS AND MISS. VALLEY CO.,
By HOLMES CUMMINS.
HOLMES CUMMINS, *Surety.*

[SEAL.]

158 STATE OF TENNESSEE, *County of Dyer,* } *ss:*

I, —— ——, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of Tennessee and a property-holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the State of Tennessee liable to execution of the value of more than five hundred dollars.

HOLMES CUMMINS.

Subscribed in my presence and by him sworn before me this 23 day of November, A. D. 1888.

M. T. BRACKEN,
Cir. Ct Cl'k.

159 C., O. & S. W. R. R. Co. & N. N. & M. V. R. R. Co. } *vs.* M. R. HENDRICKS, Adm'r, &c. }

Opinion.

The first assignment of error is upon the refusal of the circuit court to transfer the cause to the U. S. circuit court.

The grounds of the petition are that petitioner, at and before the commencement of suit, was and is now a citizen of Connecticut, and that Hendricks, adm'r, was and still is a citizen of Tennessee.

That the controversy is wholly between the petitioner, Newport

News & Mississippi Valley Company, and the plaintiff, citi-
160 zens of different States; that the Chesapeake, Ohio & Southwestern R. R. Co. is neither a necessary or proper party to this suit.

That plaintiff has joined said railroad Co. as a defendant simply for the purpose of endeavoring to defeat petitioner's right of removal.

That the course of plaintiff is fraudulent, unjust, and — illegal attempt to deprive said U. S. court of its lawful jurisdiction, as well as a fraud on petitioner's right, &c.; that in 1888 plaintiff commenced his suit against the defendants for the same matters
161 and things set forth and complained of; that after beginning suit plaintiff dismissed his said action against C. & O. and S. W. R. R. Co. and proceeded alone against petitioner.

Thereafter, on one of the days of March term, 1888, petitioner filed a petition for the removal of the cause to the circuit court of the United States. The circuit court of the State granted the prayer, &c.

Afterwards plaintiff dismissed that suit, having theretofore begun the present one against the two companies, joining the latter fraudulently and for the single purpose of divesting the Federal court of its jurisdiction and depriving petitioner of its rights, &c., he
162 having no claim whatever against C. & O. and S. W. R. R. Co.; that by his dismissal of his former suit the plaintiff admitted and confessed that he had no cause of action against the party, and that his sole cause of action was against petitioner alone.

The petition was answered with a definite denial of all fraud, of any admission or confession that the petitioner was alone liable, and insisting that both corporations were jointly and severally liable. The prayer of the petition was refused.

It is here insisted: "The sole question upon the petition for the State court to determine was whether, upon the face of the
163 petition, a good cause for removal was made. If so, then the removal was matter of right and of course, subject, however, only to enquiry in the Federal court as to the truth of the allegations of the petition."

To support this position reference is had to several cases from the U. S. Supreme Court. The latest utterance to which we are attentive *has been called* is in the case of L. & U. R. R. Co. *vs.* Wangelin, 132 U. S. Reports, 601, in which Justice Gray says: "It is equally well settled that in any case the question whether there is a
164 separable controversy which will warrant a removal is to be determined by the condition of the record in the State court at the time of the filing of the petition for removal independently of the allegations in that petition as in the affidavit of the petitioner, unless the petition both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the Federal court."

While in the case before us there is an allegation of fraud which is denied, there was no proof offered to sustain it.

The condition of the record in the State court at the time
165 of filing the petition was not such as to warrant a removal. Trying the question by the face of the record, the jurisdiction of the State court was exclusive. That condition is sought to be changed by the unsworn petition of the defendant below, who moves for a removal upon extraneous allegations without proof.

In Stone *v.* S. Carolina, 117 U. S. R., 432, Ch. Justice Waite says: "A State court is not bound to surrender its jurisdiction of a suit on a petition for removal until a case has been made on its face — shows that the petitioner has a right to the transfer." * * *
166 "The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that can be removed, and the petition must show a right in the petitioner to demand the removal. This being made to appear on the record and the necessary security having been given, the power of the State court ends in the case and that of the circuit court begins."

In this case no application was made to the Federal court and, of course, that court could not settle the question. The Federal
167 question of removal was presented to the State court, and before that court could be authorized to order the removal it was its duty to ascertain and determine that "a case had been made which on its face shows that the petitioner has a right to the transfer," and "was not bound to surrender its jurisdiction" before.

We are unable to agree with counsel for the petitioner that the language of the supreme court in construing the statutes of *of* removal means that a petition like the present without more ousts the State court of its jurisdiction and transfers it to the Federal court.
168 This may be so when the petition and bond are filed in the latter court and the duty of investigation imposed upon it. Such is clearly, we think, the true meaning of the cases. The right to petition attaches to either court at the election of the petitioner, but when he has made his election he must submit to that election for all the purposes and provisions of the statutes under which he is proceeding, and when either has passed upon the questions he is bound by the ruling, except he may appeal from the final judgment of the State court when perhaps he cannot from that of the Federal court.
169 When the supreme court says the petitioner must make a case for removal it means he must make it under the statute and to the satisfaction of the court to which he makes the application, and not that he can by piecemeal try the question in the two courts. If the contention is sound we will have the anomaly of a cause removed from the State court and suspended until the Federal court can pass upon the merits of the application, the parties in the meantime not knowing where the cause pends, and neither court knowing which has jurisdiction.
170 Since this opinion was filed it has been suggested that under the act of Congress of 1887 the application for removal can be made only in the State court. If this were so it

affords a stronger reason that that court must pass up the sufficiency of the grounds laid for removal.

A case must be made for removal and made to the court asked to remove. Under the rule insisted upon every case involving the jurisdictional amount could be removed or its trial retarded until after action of a Federal court.

Under the rule in this State there is nothing in the alle-
171 gation that the dismissal of the form- suit as to one of the parties was an admission that there was no cause of action against that party, as tort fensors are jointly and severally liable.

The 2nd assignment is the verdict and judgment for fifteen thousand dollars—excessive.

Deceased was postmaster and express agent at Trimble, on the C., O. & S. W. R. R. He was struck by an engine & train of one car and a freight caboose running on the schedule of the regular passenger train which carried the mail and express matter.
172 The engine and train which did the killing was running ahead of the passenger train, at a speed of thirty to forty miles per hour. The postmaster and express agent, passengers, and all persons having business with the trains had to cross the track in front of trains—a most dangerous and careless arrangement, one that must not be overlooked.

There were standing cars and other things calculated to obstruct the view. The train made no check of speed and the deceased in attempting to cross was struck by the engine, knocked 46 feet against a bank, and rebounded to the cross-ties; he lived about 45
173 minutes. Several other persons barely escaped a similar fate.

It was supposed to be the regular train and that it slow- to about 4 miles per hour. No notice had been given of its approach except the signal whistles. It should have slowed down or stopt at the telegraph office for orders. That it was being run at a very high and dangerous speed without proper and continuous signals is conceded, and was running on the time of the regular passenger train, which regularly slowed down in approaching and stopt at said station, a village of about three hundred inhabitants.

174 Deceased was a careful, prodent man, and not careless about crossing tracks in front of trains; was about 33 years of age.

The facts do not make out a case for reversal for excessive damages. The conduct of the engineer, who is shown to be a fast runner & had that day passed Dyersburg at the speed of sixty miles per hour, was reckless in the extreme. The throwing of the body 46 feet with a rebound leaves no room to doubt the recklessness of the engineer and his little disregard of human life.

The several requests to charge were made before any
175 charge was given. None of them were reported afterward. Under the rule in this State it was not error to refuse to give them.

Roller *vs.* Bachman, 5 Lea, 159.
Railroad *vs.* Foster, 4 Pickle.

Counsel should first hear the charge and then make such requests as in their opinion are right & proper in modification. The court makes up his charge in the progress of the case in proof and argument, and is usually prepared to deliver it at the conclusion of the argument.

176 It would be the imposition of great labor to require him to lay aside his own charge and study one or more prepared by counsel of the respective sides and remodel his to conform to many requests, as in this case such a practice would result in much confusion and a multiplication of errors, as well as delay in the trial of causes.

In this case a practice was adopted which we recommend to the profession and one we would be glad to see adopted by it.

The bill of exceptions does not set out the testimony of each witness on either side, but simply states that the proof for each tended

177 to show certain facts. It is well done, of easy comprehension, and presents what would otherwise have been a cumbersome record in a small compass and yet fully, pertinently, and distinctly raises every question of law & fact.

On his motion for new trial, the able counsel presented all his grounds in writing, thereby giving to the court every opportunity to detect any errors he may have committed.

On the trial here only these grounds were formally and fully drawn out, — make up the assignment of errors.

178 We see no reason at present why circuit courts should not require counsel to point out in this way the grounds on which they base such motions and treat as waived such as are not thus designated.

There is no reversible error in the charge as given & the judgment is affirmed.

TURNEY, *Ch. J.*

179 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State, for the western division thereof, at the April term, A. D. 1890.

Present: The Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folkes, associate judges, when the following proceedings were had, to wit:

THURSDAY, *May* 1*st*, 1890.

N. N. AND M. V. R. R. Co. *et al.* *vs.* M. R. HENDRICKS, Adm'r, &c. } ≠3. Dyer L. D., 13th Circuit.

This cause was heard upon the transcript of the record from the circuit court of Dyer county, and, it appearing to the court that in the judgment of the court below there is no error, it is therefore considered by this court that said judgment be in all things

180 affirmed, and that defendant in error, M. R. Hendricks, adm'r of J. C. Hendricks, dec'd, recover of the plaintiffs in

error, The Newport News and Mississippi Valley Railroad Co. and Chesapeake, Ohio and Southwestern Railroad Co., the sum of fifteen thousand three hundred & ninety-two & $\frac{50}{100}$ dollars ($15,392.50), the amount of the judgment of the court below, and interest on same to this date, together with the State and county tax on this litigation and the costs of the court below, and of said plaintiffs and Holmes Cummins and W. S. Draper, sureties on appeal bond, the costs of the appeal, for which let executions issue.

181 *Order Attorney's Lien. Ent. Monday, May 5th, 1890.*

N. N. AND M. V. R. R. Co. *et al.*
vs.
M. R. HENDRICKS, Adm'r, &c. } # 3. Dyer L. D., 13th Circuit.

Upon motion of Hamilton Parks, attorney for defendant in error in this case, a lien is hereby declared upon the recovery had herein on the 1st day of May, 1890, of the present term of this court for his reasonable attorney fees for services rendered the defendant in error in this case in this court and in the court below.

Order Dismissing Petition to Rehear.

N. N. AND M. V. R. R. Co. *et al.*
vs.
M. R. HENDRICKS, Adm'r. } 3. Dyer L. D.

182 The petition to rehear filed in this cause, after consideration by the court, is dismissed at the cost of petitioner.

183 To the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee:

The Newport News and Mississippi Valley Company and the Chesapeak-, Ohio and Southwestern Railroad Company, respectfully petitioning, would show as follows:

That your petitioner The Newport News and Mississippi Valley Company is a duly incorporated company, organized under the laws of the State of Connecticut, and that your petitioner The Chesapeake, Ohio and Southwestern Railroad Company is another duly incorporated company, organized under the laws of the
184 State of Tennessee; that, under the laws of said State and of the State of Kentucky, your petitioner The Newport News and Mississippi Valley Company owns and exercises certain rights and franchises in these States, and, as intended and authorized by the statutes of each of the said States, it owns and operates and since the 31 January, A. D. 1886, has continuously owned and operated, beside other railroads, a line of railway running from Memphis, Tennessee, to Louisville, Kentucky, passing through Dyer county, Tennessee, which line prior to 1st February, 1886, was owned and operated by the said Chesapeake, Ohio and Southwestern Railroad Company.

185 That heretofore a suit was commenced in the circuit court of Dyer county, Tennessee, by Mart. R. Hendricks, administrator of Jake C. Hendricks, deceased, as plaintiff, against your petitioners, as defendants, to recover from your petitioners the sum of fifty thousand dollars for the running over and killing of said decedent, Jake C. Hendricks, by an engine and car of your petitioner The Newport News & Mississippi Valley Company on its said road in Dyer county about the 12th day of December, 1887, which the said plaintiff alleged was caused by the gross negligence of
186 said company's employés in charge thereof; that said suit was taken by appeal to the supreme court of that State, which was the highest court of that State in which a decision in the suit could be had, and in that court a judgment was rendered on the 1 day of May, 1890, against your petitioners for the sum of $15,392.50 and costs; said judgment is final and no appeal lies therefrom.

That a full transcript of the record in said suit is herewith presented, and the same is made a part of this petition, being duly authenticated.

That, as appears from said record of said suit, your peti-
187 tioner The Newport News and Mississippi Valley Company, at and within the time when by the laws of the said State it was required to plead to the plaintiff's declaration, petitioned the said circuit court for a removal of said cause from that court to the circuit court of the United States for the eastern division of the western district of Tennessee, at Jackson, on the ground of diverse citizenship as between itself, a corporation of the State of Connecticut, organized under its laws and a citizen thereof and a non-resident of Tennessee, and the said plaintiff, a resident of and a citizen
188 of said last-named State, alleging "that this controversy is whol-y between your petitioner and said plaintiff, citizens of different States, and can be fully determined as between them without the presence of the other defendant. Your petitioner further shows that indeed the said Chesapeake, Ohio & Southwestern R. R. Co. is neither a necessary nor a proper party to this suit, and that the plaintiff has joined said railroad Co. as a defendant simply for the purpose of endeavoring to defeat your petitioner's right of removal of this cause to the circuit court of the United States for this district, and that said course of the plaintiff is fraudulent
189 and an unjust and illegal attempt to deprive said United States court of its lawful jurisdiction, as well as a fraud upon said petitioner's right to have this case removed to and tried in said United States circuit court.

Your petitioner says that heretofore, to wit, on the — day of ——, 1888, the said plaintiff began in this court his action against said defendants for the same matters and things set forth and complained of by him in his declaration above in this cause, and that after beginning his said suit the plaintiff dismissed his said action against said C., O. & S. W. R. R. Co. and proceeded therein alone against your petitioner.

190 Thereafter, on the — day ——, 1888, being one of the days of the March term, 1888, of this court, your petitioner filed in

said former proceedings of plaintiff against it a petition for the removal of said cause from this court to the circuit court of the United States for this district, and your honor, at the July term, 1888, of this court, granted the prayer of said petitioner and directed the removal or transfer of said former cause to said United States circuit court; that said former cause was proceeded with in said United States circuit court and issue joined between the plaintiff and your
191 petitioner, and that cause was about to be tried in said United States circuit court at Jackson, Tenn., when plaintiff dismissed his said suit in that court of his own volition, having theretofore begun this present cause in this court against your petitioner and said Chesapeake, Ohio and Southwestern Railroad Co., joining the latter herein as aforesaid, fraudulently and for the single purpose of divesting said Federal court of its jurisdiction and depriving your petitioner of his right to have this cause tried and determined by said United States court, he having no claim
192 whatever against said C., O. & S. W. R. R. Co.; that, as was and is well known to the plaintiff, said Chesapeake, Ohio & Southwestern Railroad Company, defendant, was not on said 12th day of December, 1887, and had not been since the 31st day of January, 1880, and is not in the possession, control, or operation of said railroad extending from Louisville, Kentucky, to Memphis, Tennessee, mentioned in the declaration, said railroad company, defendant, having on and prior to said 31st day of January, 1886, entered into sole and exclusive possession and control thereof, and who on and since said 1st day of February, 1886, continually to this day (including said 12th day of December, 1887), and
193 now is in the sole and exclusive control, use, and possession and operation of said railroad, controlling and operating same thro' its own agents and employes to the entire and total exclusion of said railroad company, defendant, who on said 31st day of January, 1886, entirely denuded itself of all possession and control, as well as of the operation and use of said railroad. These matters were well known to the plaintiff at and before the commencement of this action, and by his dismissal of his said former suit as against said railroad company, defendant, in this court, at its March term, 1888, the plaintiff admitted and confessed
194 that he had no cause of action against that party, as well as that his sole right or cause of action was against your petitioner alone. The matters sued for and involved in said former suit of the plaintiff were and are identical with and the same as those sued for in this present action. As above stated, this controversy is alone between the plaintiff, a citizen of Tennessee, and your petitioner, a citizen of Connecticut, and said C., O. & S. W. R. R. Co. is neither a proper nor necessary party to his suit."

That notwithstanding this petition for removal because
195 and for and upon the ground of the diverse citizenship of said Newport News and Mississippi Valley Company, as aforesaid, from that of the said plaintiff, as also aforesaid, and the fraudulent device and course of the said plaintiff in dismissing said former action pending in said United States circuit court between

them and bringing this action against it, joining said Chesapeake, Ohio and Southwestern Railroad Company, defendant, with said Newport News and Mississippi Valley Company, fraudulently, without having any cause of action against it, solely for the pur-
196 pose of thereby defeating the jurisdiction of said United States court and depriving said Newport News and Mississippi Valley Company of the right to remove the cause to said Federal court, the said petition being accompanied by a bond in proper form and penalty, with sufficient sureties, yet the said State circuit court denied and refused the prayer of said petition or to allow said cause to be removed to said United States circuit court and required your petitioners, including said Newport News and Mississippi Valley Company, to remain in said State circuit court and defend the suit on its merits.

197 That on the trial of said cause in said State circuit court a judgment was rendered against your petitioners for the sum of $15,000 and costs, and, on their appeal as aforesaid therefrom to the said supreme court of the State of Tennessee, they assigned, beside other grounds of error, the said action of the State circuit court in refusing to grant the prayer of said petition for removal and proceeding with said cause, notwithstanding that petition, etc., by petitioner The Newport News and Mississippi Valley Company.

That said supreme court of Tennessee affirmed the action
198 and judgment of the said circuit court and overruled your petitioners' said assignments of error, denying your petitioners a reversal of said judgment of said State court, with directions to grant the prayer of said petition for a removal of said cause from the State court to said circuit court of the United States, and rendered a judgment final, as aforesaid, therein.

All of which appears in full in the record and proceedings in said suit, as shown by said transcript thereof herewith exhibited, and in said final decision thereof manifest error hath been done, to the great damage of your said petitioners.

199 Wherefore said petitioners pray for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

HOLMES CUMMINS, *Attorney.*

Allowed.

P. TURNEY,
Chief Justice of Tennessee.

Filed June 2nd, 1890.

JNO. W. BUFORD, *Clk.*

200 THE NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY and The Cheseapeake, Ohio & Southwestern R. R. Co.

v.

M. R. HENDRICKS, Adm'r of J. C. Hendricks.

The said Newport News and Mississippi Valley Company and the said Chesapeake, Ohio and Southwestern Railroad Company having presented a writ of error to the Supreme Court of the United States to reverse the judgment of the supreme court of the State of Tennessee rendered the 1st day of May, A. D. 1890, affirming a judgment of the circuit court of Dyer county of the 23 day of November, A. D. 1889, adjudging that said M. R. Hendricks, adminis-
201 trator of J. C. Hendricks, recover of the said Newport News and Mississippi Valley Company and the said Chesapeake, Ohio and Southwestern Railroad Company the sum of $15,000, with costs—

It is now hereby certified that in the record, proceedings, and also in the rendition of the judgment of the said supreme court the right of the said Newport News and Mississippi Valley Company to have said cause removed from said circuit court of Dyer county to the circuit court of the United States for this district, according to its petition therefor presented to and filed in said circuit court
202 on the ground of diverse citizenship between itself and said plaintiff notwithstanding the alleged fraudulent joinder by the said plaintiff of the said Chesapeake, Ohio and Southwestern Railroad Company as codefendant with it, was brought in question and properly raised, and the decision was against such right and in denial and refusal of the said petition and prayer for a removal of the cause to said Federal court.

Given under my hand as chief justice of the supreme court of the State of Tennessee this — day of May, A. D. 1890.

P. TURNEY,
Chief Justice of Tennessee.

Filed June 2nd, 1890.

JNO. W. BUFORD, *Clk.*

203 The denial by a State court of the right claimed by a party to have the cause removed to a Federal court can be reviewed by this court on writ of error.

Kanouse *v.* Martin, 14 How., 23.
R. R. Co. *v.* Koontz, 104 U. S., 5.
Stone *v.* South Carolina, 117 U. S., 430.
Oakley *v.* Goodnow, 118 U. S., 43.
U. S. Rev. Stat-es, sec. 709.
" " " " 999.

204 Supreme Court of the United States.

THE NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY & THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY
v.
M. R. HENDRICKS, Administrator of J. C. Hendricks.

Know all men by these presents that we, The Newport News and Mississippi Valley Company and The Chesapeak-, Ohio and Southwestern Railroad Company and Holmes Cummins, are held and firmly bound unto M. R. Hendricks, administrator of J. C. Hendricks, in the sum of twenty thousand ($20,000.00) dollars; for payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, firmly by these presents.

205 The condition of this obligation is such that the above-named The Newport News and Mississippi Valley Company and The Chesapeake, Ohio and Southwestern Railroad Company have prosecuted a writ of error in the Supreme Court of the United States to reverse judgment rendered in the above-entitled action by the supreme court of the State of Tennessee.

Now, therefore, if the above-named Newport News and Mississippi Valley Company and The Chesapeake, Ohio and Southwestern Railroad Company shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make

206 good their plea, then this obligation to be void; otherwise to remain in full fore and virtue.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY COMPANY,
By its att'y, HOLMES CUMMINS.
THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY,
By its att'y, HOLMES CUMMINS.
HOLMES CUMMINS.

This bond is approved, to operate as a supersedeas.
May —, A. D. 1890.

P. TURNEY,
Chief Justice of Tennessee.

UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the chief justice and the honorable the judges of the supreme court of the State — Tennessee, Greeting:

207 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Newport News and Mississippi Valley Company and The Chesapeake, Ohio and Southwestern Railroad Company, plaintiff- in error, and M. R. Hendricks, administrator of J. C.

Hendricks, defendant in error, wherein was drawn in question the right of the said Newport News and Mississippi Valley Company to remove the said cause from the circuit court of Dyer county, of said State, into the circuit court of the United States for
208 the eastern division of the western district of Tennessee, according to its petition in said cause filed, praying for such removal, on the ground of diverse citizenship, of itself a corporation organized under the laws of the State of Connecticut and citizen of that State, and said M. R. Hendricks, administrator of J. C. Hendricks, a citizen of the State of Tennessee, and alledging the fraudulent action of said M. R. Hendricks, administrator, etc., in joining the said Chesapeake, Ohio and Southwestern Railroad Company, a corporation organized under the laws of the State of Tennessee and a citizen of that State, as codefendant with said New-
209 port News and Mississippi Valley Company, having no right or cause of action whatever against it, sorely for the purpose of divesting the Federal courts of their jurisdiction and to deprive said Newport News and Mississippi Valley Company of its right of removal to the Federal court, and the decision was against the right of removal, and in the denial and refusal of the prayer of said petition of said Newport News and Mississippi Valley Company for the removal of said cause to the said circuit court of the United States, a manifest error hath happened, to the great damage of the said plaintiff- in error, as by *its* complaint appears, we, being
210 willing that error, if any hath been done, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be
211 done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the — day of May, A. D. 1890.

JOHN B. CLOUGH,
Clerk of the Circuit Court of the United States
for the Western District of Tennessee.

Allowed by—

P. TURNEY,
Chief Justice of the Supreme — of Tennessee.

United States of America to Martin R. Hendricks.

212 The United States of America to Martin R. Hendricks, administrator of J. C. Hendricks:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, at Jackson, wherein The Newport News & Mississippi Valley Company and The Chesapeake, Ohio and Southwestern Railroad Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned
213 should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this 2nd day of June, A. D. 1890.

P. TURNEY,
Chief Justice of Tennessee.

214 THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State, for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the transcript of the record from the circuit court of Dyer county, Tenn., appealed to said supreme court, and of the assignment of errors, judgment, and opinion of said supreme court, and of all other proceedings in the case of The Newport News & Mississippi Valley Railroad Co. and Chesapeake, Ohio and Southwestern Railroad Co. *vs.* M. R. Hendricks, administrator of J. C. Hendricks, dec'd, as appears of record now on file in my office.

Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.

In testimony whereof I have hereunto set my hand and affixed the seal of
215 *of* the court, at office, in the city of Jackson, on this the 22nd day of August, 1890, and of the Independence of the United States the 115th year.

JNO. W. BUFORD, *Clerk*,
By ROB'T LINDSEY, *D. C.*

216 STATE OF TENNESSEE:

Judicial department.

Office of Jno. W. Buford, clerk supreme court.

JACKSON, *Aug.* 25, 1890.

Mr. Holmes Cummins, Memphis, Tenn.

DEAR SIR: Please find enclosed copy of petition, which we send by your request.

It is not certified because verification of record covers it, too.

Yours, etc., JNO. W. BUFORD.

217 In the Supreme Court of Tennessee, Jackson, April Term, A. D. 1890.

THE NEWPORT NEWS AND MISSISSIPPI VALLEY Co. and The Chesapeake, Ohio and Southwestern R. R. Co.
vs.
M. R. HENDRICKS, Adm'r of J. C. Hendricks, Dec'd.
} # —. L. D., 14 Cir.

In this cause the plaintiffs in error petition the court for a rehearing on the following grounds:

In the opinion of the court pronounced herein on the 3 day of May, 1890, it is stated by the court that the petition for re-
218 moval of this cause from the circuit court of Dyer county to the circuit court of the United States, made below by the Newport News & Mississippi Valley Co., is not sworn to nor verified.

No question was made at the hearing by appellees on this point, and the omission of the clerk of the lower court to correctly transcribe the said petition and the verification thereof was not mentioned nor relied on by counsel for appellee nor known by appellants or their counsel.

In truth, said petition for removal was duly and properly verified on the day that it was presented and filed in the circuit court of Dyer county in the following words, etc.:

219 STATE OF TENNESSEE, }
County of Dyer. }

I, Holmes Cummins, being duly sworn, say that I am the agent and attorney of the petitioner, The Newport News & Mississippi Valley Co.; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are full and true.

HOLMES CUMMINS.

Subscribed and sworn to before me on this 23 day of November, 1888.

M. T. BRACKEN,
Circ't Cl'k.

Endorsed: Filed 23 Nov., 1888—M. T. Bracken, cl'k—as appears from the original file and record of this cause in said circuit
220 c't of Dyer Co., herewith exhibited to the court.

Your petitioners show that in the lower court the plaintiff below made no objection to said removal petition for want of affidavit thereto or verification thereof, but filed an answer thereto.

That at the hearing in this court appellee made no question against the said removal petition for want of verification thereof, etc., but relied alone upon his said answer or reply to said petition as filed in the lower court, and the first intimation of the want of affidavit thereto is made in the opinion of this court.

That, indeed, by the 4th rule of practise of this court—1
221 Pickle, 752—the clerk of the lower court is not required, but rather is forbidden, to copy affidavits, etc., into the transcript where there is no question there-bouts in the court below, and, as above stated and shown, no question was made, but, on the contrary, the issue thereon was placed on wholly other grounds than want of verification of their removal petition in said court below as well as in this court.

For this reason and on their facts and upon the authority of above-quoted rule of this court petitioners ask a rehearing for the purpose of having the record show the truth as to the verification of
222 said removal petition, or, in the alternation, to have the court alter its opinion stating said petition to have been unsworn to, or, in the third alternation, to have the court rule that under said rule of this court it proposes for the clerk of the lower court not to transcribe said affidavit into the record as certified to this court.

And for general relief.

On this 8 May, 1890, I mailed, postpaid, to H. Parks, the att'y for appellee, at Nashville, Tenn., a true copy of above petition.

JNO. W. BUFORD, *Cl'k.*

223 The United States of America to Martin R. Hendricks, administrator of J. C. Hendricks:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, at Jackson, wherein The Newport News and Mississippi Valley Company and The Chesapeake, Ohio and Southwestern Railroad Company are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this 2nd day of June, A. D. 1890.

P. TURNEY,
Chief Justice of Tennessee.

224 [Endorsed:] (43.) M. R. Hendricks, adm., *vs.* Newport News & Miss. Valley R. R. Co. Citation. (Original.)

WESTERN DIST. OF TENN.:

At Trimble, Dyer county, Tenn., and within said district, and on the 4th day of September, 1890, I executed the within citation by reading and making known the contents hereof to Martin R. Hendrick, administrator of J. C. Hendricks, and at same time and place personally served a true copy hereof upon him.

J. W. BROWN,
U. S. Marshal, W. D. T.,
By JOHN E. HOGAN, *Deputy.*

Serv	2 00
Exp.	2 50
	$4 50

225 [Endorsed:] Supreme Court U. S. 1893, October term. No. 159. The Newport News & Miss. Valley Co. *et al.*, pl'ffs in error, *vs.* M. R. Hendricks & *al.* Citation and proof of service. Office Supreme Court U. S. Filed Sep. 8, 1890. James H. McKenney, clerk.

Endorsed on cover: Case No. 14,119. Tennessee supreme court. No. 159. The Newport News & Mississippi Valley Company and The Chesapeake, Ohio & Southwestern Railroad Company, plaintiffs in error, *vs.* Martin R. Hendricks, administrator of J. C. Hendricks, deceased. Filed August 29, 1890.

154 U.S.
154 U.S. 512

FILED.
OCT 16 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1893.

THE NEWPORT NEWS & MISSISSIPPI VALLEY COMPANY AND ANOTHER,

vs. } No. 159.

M. R. HENDRICKS, *Administrator of J. C. Hendricks, Deceased.*

In Error to the Supreme Court of Tennessee.

BRIEF FOR PLAINTIFFS IN ERROR.

HOLMES CUMMINS,
ATTORNEY.

C. C. TOOF & CO., PRS. & BKBRS., MEMPHIS.

In the Supreme Court of the United States

THE NEWPORT NEWS & MISSISSIPPI VALLEY CO. AND ANOTHER

versus

M. R. HENDRICKS, ADMR. OF J. C. HENDRICKS.

In Error to the Supreme Court of Tennessee.

STATEMENT OF THE CASE.

The defendant in error brought this action in the State circuit court against the plaintiffs in error for the purpose of recovering damages for injuries to and death of his intestate, caused by a collision with a locomotive engine on the railroad of one of the plaintiffs in error.

Within the time allowed therefor by the statute, the Newport News & Mississippi Valley Company, one of the plaintiffs in error, filed in the State circuit court its petition for the removal of the cause as to it into the Circuit Court of the United States for that district, on the ground of diverse citizenship, in that the petitioner was a corporation organized under the laws of the State of Connecticut and a citizen of that State, while the defendant in error (the plaintiff in the State circuit court) was a citizen of the State of Tennessee, and that the plaintiff (defendant in error) had joined the Chesapeake, Ohio & Southwestern Railroad Company as defendant to the action without

having any cause of action whatever against it, and solely for the purpose of thereby defeating the petitioner's right of removal of the cause to the Federal court.[1]

An answer to this petition for removal was filed by defendant in error, in which the grounds for removal were denied.[2] Thereupon the State circuit court refused to grant the removal,[3] and the cause proceeded to trial in that court, resulting in a judgment for defendant in error for $15,000.00,[4] which judgment was on appeal by plaintiffs in error (the defendants in the State circuit court) affirmed in the Supreme Court of Tennessee.[5] From that judgment this writ of error was taken.[6]

ASSIGNMENT OF ERROR.

The plaintiffs in error assign error on the record of this cause from the Supreme Court of Tennessee as follows:

The court erred in not reversing the judgment of the circuit court of Tennessee; and in not directing that court to allow and grant the removal of this cause from said State circuit court to the Circuit Court of the United States, according to the petition therefor presented to said State circuit court by plaintiff in error, the Newport News & Mississippi Valley Company, as also assigned as error and stated in full in the record from the Supreme Court of Tennessee, on pages 123 and 128 to 135 of the record.

1 Record pp. 26 to 34.
2 Record pp. 38, 39, 40.
3 Record pp. 40, 41, 42.
4 Record pp. 50, 51.
5 Record pp. 179, 180.
6 Record pp. 200, 201, 202–207 to 211.

BRIEF.

I.

The petition filed for the removal of this cause from the State to the Federal court upon its face stated a good cause for removal. It alleged that the plaintiff had no cause of action whatever against the C. O. & S. W. R. R. Co., and had fraudulently made that company a defendant to his suit solely for the purpose of thereby defeating the petitioning defendant in its right to the removal. It stated that plaintiff had previously sued these same parties about this same matter, but admitting want of cause of action against the C. O. & S. W. R. R. Co., had dismissed that former suit as against it, and proceeded with his declaration alone against the N. N. & M. V. Co., whereupon the latter had removed that proceeding to the Federal court, and that case had been pending in that tribunal, but was dismissed by the plaintiff on beginning this action solely for the purpose of in this way defeating the jurisdiction of the Federal court. The petition alleges utter want of cause of action by plaintiff against the resident defendant C. O. & S. W. R. R. Co., it not having been in possession, control or operation of the railroad on which plaintiff's intestate was injured for two years or more prior to the killing, and the injury complained of having been inflicted alone by the N. N. & M. V. Co. and its employes with its train. The answer to that petition denied its averments, and made an issue of fact thereon. On the face of this petition, as I have said, a good cause for removal was stated. Whether the facts were correctly stated or not could be enquired of alone in the Federal court.[7] The

7 Stone v. S. Carolina, 117 U. S. 430.
Carson v. Hyatt, 118 U. S. 279-287.

sole question upon this petition for the State court to determine was whether upon the face of the petition a good cause for removal was made. If so, then the removal was a matter of right, and, of course, subject however, only to an enquiry in the Federal court as to the truth of the allegations of the petition.

The petition being in proper form and accompanied by sufficient bond, all jurisdiction of the State court over the subject matter of the litigation ceased, and all other proceedings by the State court are void.[8]

No order of the State court is necessary to complete the removal, if the petition is sufficient on its face, and is accompanied by a proper bond.[9]

The petition being sufficient on its face, and the bond in accordance with the law, all jurisdiction of the State court ceases absolutely, and the jurisdiction of the Federal court attaches; and all after proceedings in the State court are absolutely null.[10]

In Marshall v. Holmes, Mr. Justice Harlan delivering the opinion, said: "After the filing of the petition for removal, accompanied by a sufficient bond, and alleging that the controversy was wholly between citizens of different States, the State court was without authority to proceed further if the suit in its nature is one of which the Circuit Court of the United States could rightfully take jurisdiction. If under the act of Congress the cause was removable, then upon the filing of the above petition and

8 R. R. Co. v. Miss., 102 U. S. 135.
Kern v. Huidekoper, 103 U. S. 485.
R. R. Co. v. Koontz, 104 U. S. 5.
Davis v. S. Carolina, 107 U. S. 597.
R. R. Co. v. White, 111 U. S. 134.
Gordon v. Sangest, 16 Peters 97.
Kanouse v. Martin, 15 Howard, 198.

9 Kern v. Huidekoper, 103 U. S. 485.

10 Steamship Co. v. Tugman, 106 U. S. 118.
R. R. Co. v. Koontz, 104 U. S. 5.

bond, it was in law removed so as to be docketed in that court, notwithstanding the order of the State court refusing to recognize the right of removal."[11]

Further citation of authority in support of these propositions seems unnecessary. If the allegations of the petition for removal are true, then the N. N. & M. V. Co. was entitled to have this case sent to the Federal court; and those allegations are simply that the defendant is a corporation non-resident of Tennessee and a citizen of Connecticut, is sued by a citizen of Tennessee in one of its courts: and that such plaintiff for the single purpose of defeating the right of removal to and the jurisdiction of the Federal court (where indeed his suit with the petitioning defendant about this very matter had been pending, issues joined and trial about to be had), had dismissed his former suit in the Federal court, and had brought the present action in the State court, making a resident of the State co-defendant with the petitioner, having no cause of action whatever against such resident defendant, and making it a party for the sole purpose of defeating the right to remove. Now if these facts were true, and enquiry as to their truth could be had alone in the Federal court, then the removal should have been had; and if this be true, all the subsequent proceedings in the State court were absolutely void.

The case made in this removal petition is not that of one of two defendants sued jointly for a tort, the removing petitioner alleging a severable controversy, as in the Thorn Hedge Co. and other cases in this court,[12] but is simply a question of whether the plaintiff can join a resident defendant, against whom he has no cause of action, in his suit

11 Marshall v. Holmes, 141 U. S. 595.

12 Pirie v. Tevdt, 115 U. S. 41.
Sloan v. Anderson, 117 U. S. 275.
Plymouth Co. v. Amador Co., 118 U. S. 264.
Thorn Hedge Co. v. Fuller, 122 U. S. 535.

against the real tort feasor, who is a non-resident and a citizen of another State from the plaintiff, simply for the purpose of thereby wrongfully and fraudulently preventing a removal to the Federal court, and defeating the rightful jurisdiction of the cause.

A case distinctly in point is that of[13] R.R.Co. v. Wangelin.

The opinion of the Supreme Court of Tennessee[14] distinctly shows that this question of right of removal to the Federal court was insisted upon by the plaintiffs in error in that court, being expressly raised by proper assignment of error,[15] as well as that such question was there decided adversely to plaintiffs in error.[16]

This court had before it in the case of Railroad Co. v. Daughtry[17] this reasoning and decision of the Tennessee Supreme Court, and said as to same: "The Supreme Court of Tennessee was of opinion that it was competent for the State circuit court to pass upon the issue of fact made by the affidavit of Daughtry upon the statement in the petition in regard to his citizenship, and to retain the suit, because on that issue the railroad company had not shown that he was a citizen of Tennessee; but it is thoroughly settled that issues of fact raised upon petitions for removal must be tried in the Circuit Court of the United States," citing authorities.

As shown by the record, the attention of the Supreme Court of Tennessee was called to the manifest error in its opinion as to the Federal statutes regarding this removal question, etc.,[18] resulting, however, only in a reaffirmance of its errors.

13 R. R Co. v. Wangelin, 132 U. S. 591-601-603.
14 Record pp. 39-40.
15 Record p. 29.
16 Record pp. 39-40-41.
17 K. C. R. R. Co. v. Daughtry, 138 U. S. 298-302.
18 Record pp. 40-41.

II.

In the opinion of the State Supreme Court, it is stated that the removal petition is not sworn to, and some stress is laid upon that point. The petition for rehearing filed in that court[19] shows that not only was the removal petition properly verified; but more, that under the rules of the State Supreme Court the transcript of the record from the State circuit court should not contain such verification in the absence of any contest being made because of such matter.[20]

The defendant in error filed in the State circuit court his answer to the petition for removal, controverting the facts stated as entitled plaintiff in error, N. N. & M. V. Co., to such removal, and making no question as to verification or want thereof,[21] and by its own rule the Supreme Court of the State had forbidden the clerk of the circuit court from copying such affidavit when making the transcript on the appeal to that court.

However good practice it may be to verify such petitions by proper affidavit, yet the statute does not so require, and no rule of this court has so provided.

In removal petitions for the cause of denial of civil rights, etc., under sections 641 and 643 Revised Statutes, it is required that the petition be verified by the oath of the petitioner.[22] The case at bar, however, is not of those classes, and does not come within those sections of the statute. It is simply a suit of a civil nature by a citizen of the State where brought against one, a citizen of another State, etc., within the terms of section 639 U. S. Revised Statutes as amended by the act of 3d of March, 1887, and nowhere in the statute is there any requirement of verifi-

19 Record pp. 51–52.
20 Rule 4, 1st Pickle 752.
21 Record p. 10.
22 Virginia v. Rives, 100 U. S. 313–316.
Virginia v. Paul, 148 U. S. 122.

cation of such petitions.[23] I take it that the petition for removal in the leading case of Meyer v. Construction Co., etc., was not verified, yet this court held that petition good in form and good in fact.[24]

In Street R. R. Co. v. Hart this court said, "the absence of an oath to a petition was, at most, only an informality, which could be and was waived by the city. It made no such objection in its motion to remand. This view is in accordance with the ruling in Ayer v. Watson, 113 U. S. 594, 598, as to modal and formal matters under section 3 of the act."[25]

There was no question made by defendant in error (the plaintiff below) either in the State circuit or Supreme Court that the petition for removal was not verified. The Supreme Court of the State seems to have discovered the supposed defect, and, *suo motu*, raised the question, its own rules to the contrary notwithstanding. However, as shown by the record exhibited on the petition for rehearing,[26] the removal petition was duly verified when filed, and the omission of such verification by the clerk of the State circuit court when making the transcript of the record to send up to the Supreme Court of the State was simply in conformity to the rule of that (Supreme) court.[27]

I therefore submit that the assignment of error is well taken, and that the judgment of the Supreme Court of Tennessee should be set aside, and the cause be remanded to that court with instructions to reverse the judgment of the State circuit court, and to direct that court to grant the prayer of the petition for removal, etc.

HOLMES CUMMINS,
Atty. for Plaintiffs in Error.

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23 Connor v. Scott, 4 Dillon 242.
Houser v. Clayton, 3 Woods C. C. 373.
Bank v. Wheeler, 3 Cent. Law J. 13.
Dillon's Removal of Causes, secs. 126–128.
24 Meyer v. Construction Co., 100 U. S. 457–471.
25 Street R. R. Co. v. Hart, 114 U. S. 654–660.
26 Record pp. 51–52–35–36–37.
27 1 Pickle 752.